



Superannuation
Complaints
Tribunal

SCT Quarterly Bulletin

Issue No. 61

1 July 2010 – 30 September 2010

Chairperson's Report

Quarterly statistics

During the quarter, the total number of written complaints received by the Tribunal decreased by 3.6% compared to the previous quarter. The number of telephone enquiries increased by 29.0%. The recent trend of a rise in the percentage of total complaints received being within the Tribunal's jurisdiction continued, with 66.2% of complaints being within jurisdiction (last quarter 64.3%). The number of complaints within jurisdiction relating to fund administration as a percentage of total complaints decreased to 50.0% (last quarter 51.3%) of all complaints during the quarter.

Complaints about death benefit distributions decreased slightly to 34.3% (last quarter 35.5%) of all complaints. Complaints about disability benefits increased to 11.4% of total complaints. The Tribunal finalised 575 complaints in the quarter, an increase of 9.1% on the previous quarter. At conciliation, the Tribunal achieved a settlement rate of 67.0% (previous quarter 65.1%). The Tribunal determined 21 cases during the quarter (previous quarter 28 cases). Overall, the Trustee's decision was affirmed in 85.7% of these cases.

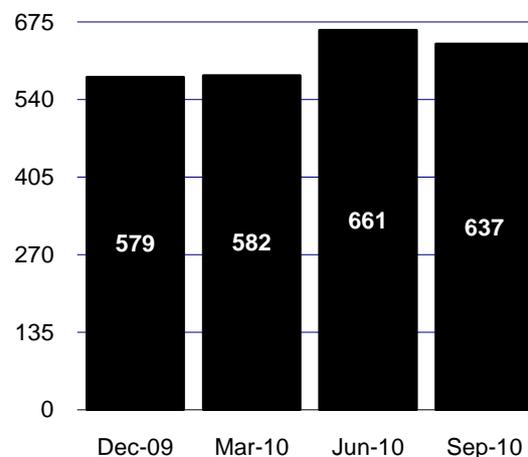
Jocelyn Furlan
Chairperson

Performance

Statistical Overview

Written Complaints

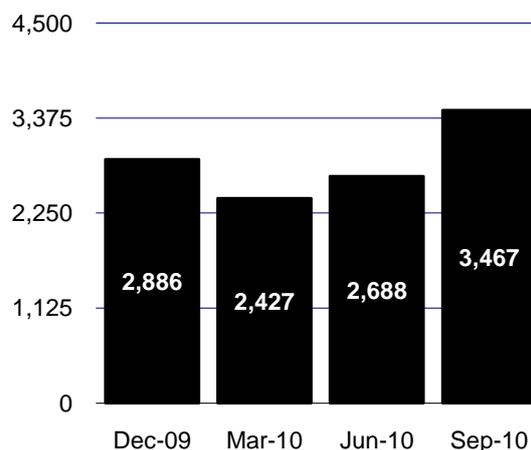
This quarter, the Tribunal received 637 written complaints (last quarter – 661), which is a decrease of 3.6% compared with the previous quarter.



Telephone Enquiries

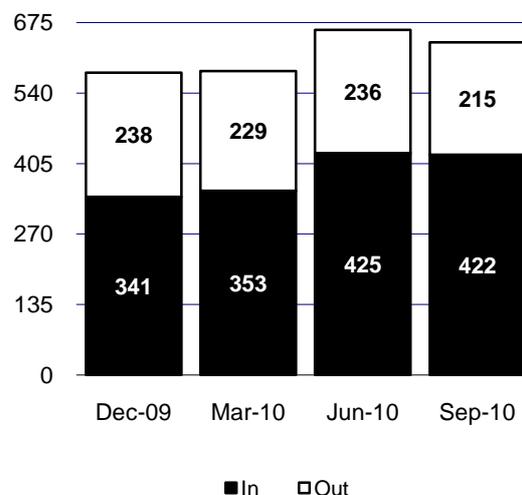
The Tribunal received 3,467 telephone calls this quarter (last quarter – 2,688), which is an increase of 29.0% compared with the previous quarter.

The Tribunal dealt with a wide range of enquiries, the most popular questions were about the Tribunal itself (19.4%), followed by complaint related enquiries (16.7%) and fund administration enquiries (12.3%).



Jurisdiction

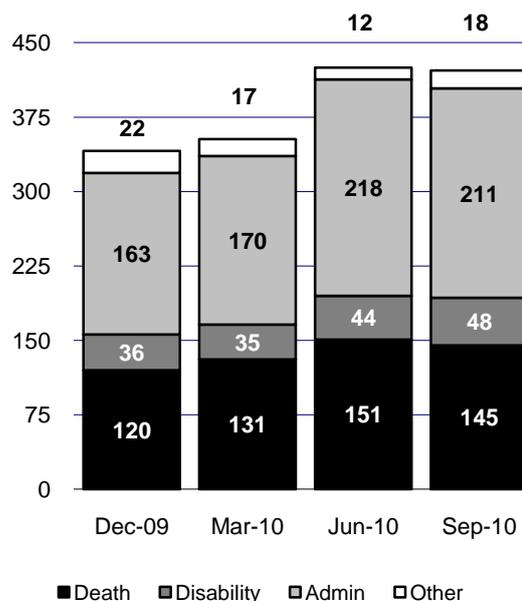
Of the 637 written complaints received this quarter, 422 (66.2%) complaints were within jurisdiction (previous quarter – 64.3%). Of the 215 (33.8%) complaints closed as outside jurisdiction, 132 (61.4%) were closed pursuant to s.19 of the SRC Act because the complainant had failed to lodge a complaint with the Trustee or the 90 day time limit had not passed from the date of complaint to the Trustee, (last quarter – 55.9%).



Nature of Written Complaints Within Jurisdiction

Complaints fall into four major categories – ‘Death’, ‘Disability’, ‘Administration’ and the ‘catch-all’ category of ‘Other’.

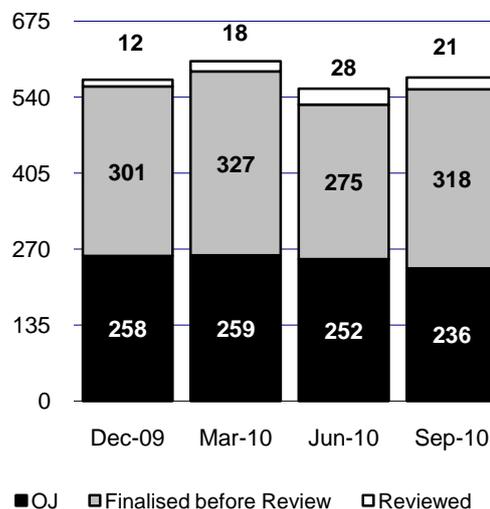
Leaving aside the ‘Other’ category, ‘Administration’ complaints comprised the largest category of all written complaints received within jurisdiction – 50.0% (last quarter – 51.3%). ‘Death’ complaints made up the second-largest category at 34.3% (last quarter – 35.5%), followed by ‘Disability’ at 11.4% (last quarter – 10.4%).



Complaints Finalised

The Tribunal finalised 575 written complaints this quarter, up from 527, or 9.1%, in the last quarter, including some complaints carried over from the previous quarter.

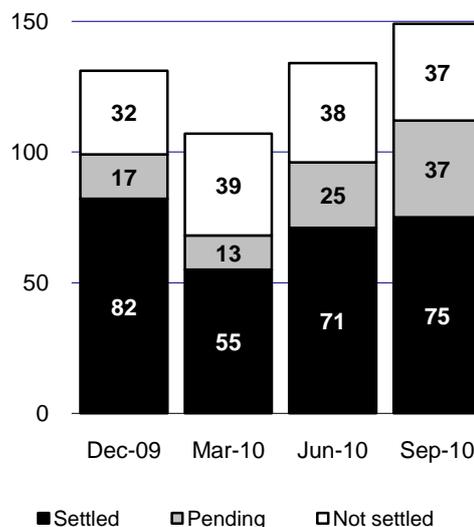
Of the 575 finalised complaints, 3.7% were finalised at review (last quarter – 5.3%), 55.3% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 46.9%) and 41.0% were outside jurisdiction (last quarter – 47.8%).



Conciliation Conferences

The Tribunal conciliated 149 cases in the quarter, an increase of 11.2% on last quarter's 134.

Of the 112 cases concluded, settlement was achieved in 75, resulting in a settlement rate of 67.0% (last quarter – 65.1%). The outcome is pending in 37 cases (24.8%) compared to 25 cases (18.7%) for last quarter.



Nature of Conciliation Cases

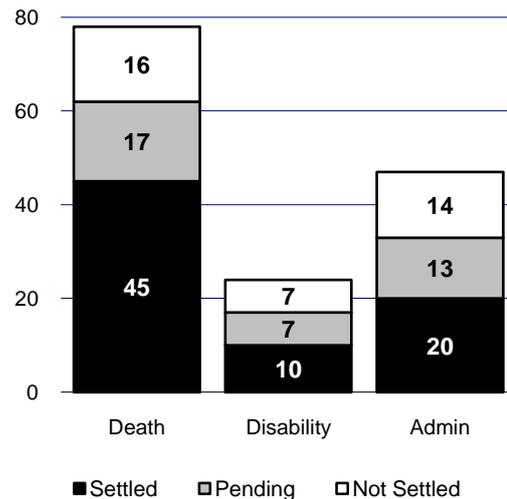
The categories of note in the quarter are as follows:

Death Benefits – Of the 61 concluded cases, 45 (73.8%) were settled.

Disability – Of the 17 concluded cases, 10 (58.8%) were settled.

Administration – Of the 34 concluded cases, 20 (58.8%) were settled.

Other – no matters conciliated.



Review Determination Outcomes for the Quarter

The Tribunal determined 21 cases this quarter (last quarter – 28 cases).

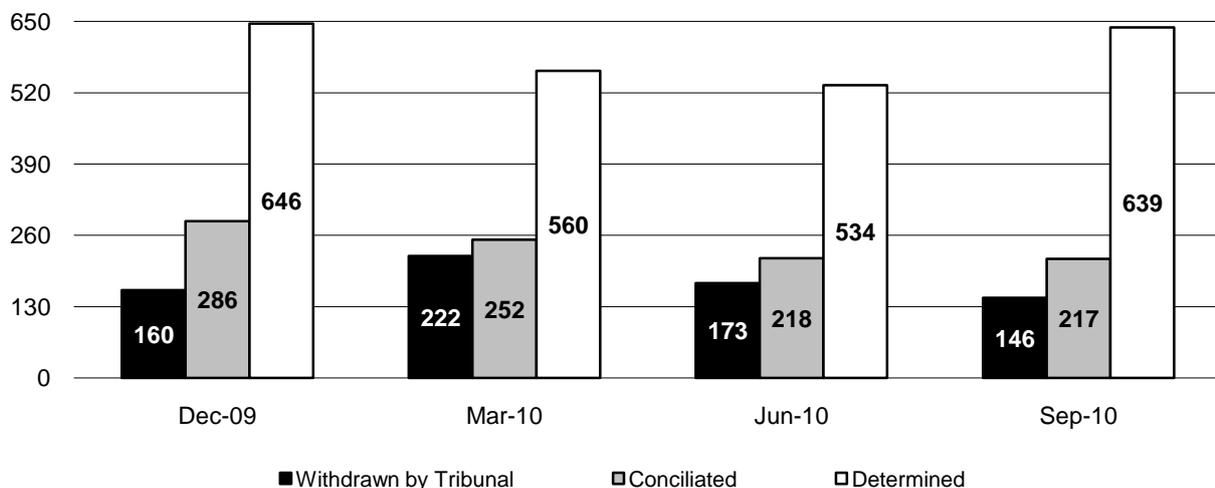
The largest category of complaints determined at review was death complaints – 9 (42.9%). Disability complaints made up the second largest category - 7 (33.3%), followed by administration complaints – 4 (19.0%).

| | Death | | Disability | | Admin | | Other | | Total | | |
|--------------|-------|-----|------------|-----|-------|-----|-------|-----|-------|-----|-------|
| | Qtr | YTD | Qtr | YTD | Qtr | YTD | Qtr | YTD | Qtr | YTD | YTD % |
| Affirmed | 7 | 7 | 7 | 7 | 4 | 4 | 0 | 0 | 18 | 18 | 85.7 |
| Remitted | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0.0 |
| Varied | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0.0 |
| Set aside | 2 | 2 | 0 | 0 | 0 | 0 | 1 | 1 | 3 | 3 | 14.3 |
| Total | 9 | 9 | 7 | 7 | 4 | 4 | 1 | 1 | 21 | 21 | 100.0 |

85.7% of Trustee decisions were affirmed during the quarter, compared with 64.3% in the June quarter and 72.2% in the March quarter.

Efficiency

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



Recent Determinations of Interest

Death benefit distribution – estranged husband: D10-11\005

The Complainant was the husband of the Deceased Member and complained in relation to the trustee's decision to pay the benefit equally to the parents of the Deceased Member.

On joining the fund on 8 April 1991 the Deceased Member completed an application form in which she nominated her parents and her brother as her preferred beneficiaries. On 4 March 2004 the Deceased Member and the Complainant married. The Deceased Member died on 3 March 2007.

On 17 March 2008 a recommendation was prepared for the Trustee as to how the death benefit should be distributed, recommending that 34% of the benefit be paid to her mother, 33% to her father and 33% to her brother.

By letter of the same date the Trustee advised the husband that the Trustee had resolved to distribute the death benefit to the parents and brother as per the recommendation above.

On 31 March 2008 the Trustee responded to a request for reasons from the husband's solicitor stating it had placed significant weight on the wishes of the Deceased Member and that her nomination of beneficiaries had not been amended despite seven communications to her (in the form of benefit statements) since her marriage. The letter requested evidence of the financial dependency of the husband on his wife.

On 5 May 2008 the Trustee wrote to the husband, parents and brother stating that the benefit would normally be paid to a financial dependant before any non-financial dependants and requesting details of the financial dependency of each of them. At the date the information was requested the Trustee had already made its preliminary decision to distribute the death benefit to the parents and brother.

In September 2008 there was a further recommendation to the Trustee. The conclusion expressed was that there was sufficient evidence to show that the parents were financially dependent, although the evidence was not provided, and that the Deceased Member had separated from her husband.

The recommendation said that it was reasonable to assume that the husband had some degree of financial dependency on his wife, however, from the evidence available there was no likelihood of ongoing support by the Deceased Member of her husband. It noted that the Trustee had a policy of maintaining the wishes of the member and accordingly, despite it saying earlier that the brother did not appear to have been financially dependent, the recommendation was to split the benefit between the parents and the brother.

In the meeting on 19 September 2008 the directors of the Trustee resolved, because her brother was not financially dependent on her, that 50% of the death benefit be paid to the mother and 50% to her father and advised the husband in a letter dated 25 September 2008.

In a letter dated 13 October 2008 the Trustee responded to a letter from the husband's solicitor and gave reasons for its decision including that the Deceased Member had separated from the husband. The Trustee also said that the Deceased Member had financially supported her parents from time to time and there was sufficient evidence to show that her parents were financially dependent on her.

The husband had asserted that the Deceased Member had not had seven opportunities to change her beneficiary nomination because she did not receive the statements as they were addressed to a property which she rented out. The Trustee responded that it relied on the wishes of the member unless there was a compelling case to the contrary and expressed the conclusion that it was appropriate to vary

the Deceased Member's wishes by paying the benefit to the parents only as they appeared to be in the most financial need.

On 3 November 2008 the Trustee resolved to affirm the previous decision and in a letter of the same date the husband's solicitor expressed the husband's dissatisfaction with the Trustee's letter of 13 October 2008, taking issue with the various reasons given by the Trustee for their decision.

The solicitor pointed out that all of the Deceased Member's income was paid into a joint bank account she held with her husband and an examination of bank statements demonstrated no payments were made from that account to the parents during the three years of marriage. The solicitor also pointed out that the Deceased Member was unemployed for the last seven months of her life and totally dependent on her husband, therefore, if the Deceased Member had supported her parents financially during this period the money would have come from the husband.

The solicitor also made the point that the Deceased Member was living with her husband up until the date she was admitted to hospital and the evidence indicated that she intended to continue to live with him when she was discharged from hospital.

It was also said that, from the time the Deceased Member became unemployed the husband had been paying the mortgage instalments on the house that the Deceased Member owned which was leased to tenants.

In its review of the complaint the Tribunal noted that in statutory declarations, sworn by the parents, they had answered "No" in response to the question "At the time of Death were you financially dependent upon the Deceased?". That statement was changed in a subsequent statutory declaration in which they attested that, in November 2001, the Deceased Member gave them \$3,000 towards the cost of the conveyance of their property - well before her marriage to the Complainant.

In that declaration the parents also deposed to the fact that the Deceased Member assisted them every two months or so after that with the cost of their groceries and paid some of their utilities bills from 2001 onwards. They said that the assistance came to in excess of \$1,000 each year plus one off items such as the purchase of a mobile phone.

They also referred to the fact that, in 2005 when her father was diagnosed with cancer, the Deceased Member said that she would increase her mortgage to assist in paying for her father's treatment but that it did not become necessary to do so.

In a letter from the mother to the Trustee she said whilst the Deceased Member was in hospital she had advised her parents that she did not wish to return to her husband and that she would live with them instead for the time being.

It was the view of the Tribunal that the points made in the solicitor's letter of 3 November 2008 should have had the effect of the Trustee deciding to reconsider its decision to determine whether to affirm its decision or change it.

The evidence that the husband and the Deceased Member were living together up until the time she was hospitalised is undisputed and the Tribunal found accordingly. The husband disputed the evidence of the parents that the Deceased Member did not intend to live with him after leaving hospital and in the view of the Tribunal there was insufficient evidence for the Trustee to conclude that they were separated.

In the view of the Tribunal there was insufficient evidence for the Tribunal to be able to conclude that the parents were financially dependent.

The definition of "Dependant" in the deed included any person who was a dependant within the meaning of that term in the *Superannuation Industry (Supervision) Act*

1993 ('the SIS Act'). Under the SIS Act the word "Dependant" is defined as including any person with whom the person in question had an interdependency relationship.

One of the requirements for there to be an interdependency relationship between the Deceased Member and her parents is that they were living together but this was not the case. Consequently, it was the Tribunal's view that the parents were not in an interdependency relationship with the Deceased Member and there was insufficient evidence that they came within any of the other elements of the definition of "Dependant" in the SIS Act.

The Tribunal noted that although the parents had been nominated by the Deceased Member to receive her benefit that nomination was made well before her marriage. Furthermore, there was insufficient evidence that the parents were "Dependant" as defined in the deed.

The husband, as the spouse of the Deceased Member, clearly came within the definition of "Dependant".

The Tribunal's view was that it was unfair and unreasonable to the husband for the Trustee to have decided to pay the death benefit to the parents rather than to him as the Deceased Member's husband. It was the view of the Tribunal that the Trustee should have decided to pay the benefit to the only person who clearly came within the definition of "Dependant" - the husband.

Accordingly, the determination of the Tribunal was to set aside the Trustee's decision and to substitute its decision that the whole of the benefit be paid to the Complainant.

Death benefit distribution – complaint by adult daughter: D10-11\006

The Complainant was the adult daughter of the Deceased Member and complained that the Trustee's decision to pay the death benefit to the Deceased Member's legal personal

representative ('the LPR') was unfair or unreasonable.

The Deceased Member left three daughters with his former wife (of whom the Complainant was the youngest) and a daughter of the former wife who was not the daughter of the Deceased Member.

The Trustee identified the Complainant, the eldest daughter and the second daughter as potential beneficiaries. The Trustee was unsure whether the former wife's daughter was a potential beneficiary.

It determined to pay the benefits to the Deceased Member's estate.

The Tribunal noted that the eldest and second daughters were potential beneficiaries because each of them was a child of the Deceased Member. The Tribunal noted that the Complainant was also an eligible beneficiary because she was a daughter of the Deceased Member. Further, there was evidence before the Tribunal that the Complainant was financially dependent on the Deceased Member as they were living in the same house and jointly spending approximately \$250 per week on living expenses at the time of his death.

The former wife made no claim on the benefit for herself. She and the Deceased Member were divorced prior to the death of the Deceased Member and he was not providing her with any financial support at the time of his death.

The Tribunal noted that clause 1.1 of the trust deed defined 'child' as including a step-child, an ex-nuptial child and an adopted child. From the evidence before the Tribunal, the former wife's daughter did not meet the criteria as she was not his biological daughter, he had not adopted her and he and the former wife divorced prior to his death. Accordingly she was not a 'child' of the Deceased Member as that term was defined.

The former wife stated, however, that the Deceased Member had financially supported the former wife's daughter's educational expenses and travel from the overseas country where she lived to Australia. The former wife valued these contributions as \$25,000 per annum for education and \$5,000 every four months for the overseas trips. She stated that she had no records of the payments because the Deceased Member required them for taxation purposes. The Complainant disputed the support provided.

In the absence of further supporting evidence and in light of the conflicting evidence as to the care of the former wife's daughter during the period up to the Deceased Member's death, the Tribunal was of the view that, on balance, financial dependency had not been established. Accordingly, the former wife's daughter was not a potential beneficiary.

The Tribunal concluded that the potential beneficiaries were, therefore, the Complainant, the eldest daughter, the second daughter and the LPR.

The next issue for determination by the Tribunal was the fairness and reasonableness of the Trustee's decision to pay the benefit to the LPR.

The Complainant provided statutory declarations from friends and relatives indicating that she lived up to five days per week with the Deceased Member and that he provided her with assistance in the form of cash, and stated that without that financial support she could not have supported herself. These declarations also indicated that the eldest daughter and the second daughter had left home approximately 10 years before the death of the Deceased Member.

The basis of the claims of the eldest and second daughters was that they, along with the Complainant, were the daughters of the deceased member and that the benefit should have been paid to the estate such that each of them received one third of the death benefit.

The Tribunal noted that neither the eldest nor the second daughter claimed any financial relationship with the Deceased Member at the time of his death. On the other hand, there was evidence that the Complainant was financially dependent on the Deceased Member in that lived together and shared living expenses at the time of his death. In the Tribunal's view the Complainant could reasonably have expected ongoing support from the Deceased Member had he not died. Also, she was the only person with any such expectation.

In the Tribunal's view the Complainant had suffered loss of financial support as a result of the death of the Deceased Member and, in all the circumstances of this complaint, her entitlement to the Deceased Member's benefit was superior to that of the eldest daughter and the second daughter. Accordingly, the Tribunal determined that the decision of the Trustee to pay the death benefit to the LPR operated unfairly and unreasonably in relation to the Complainant in the circumstances. The Tribunal set aside the decision and substituted its own decision that the death benefit be paid to the Complainant.

Death benefit distribution – paid to spouse, complaint by adult son: D10-11\016

The Complainant, the adult son of the Deceased Member, lodged a complaint that the decision of the Trustee to pay the death benefit to the spouse was unfair or unreasonable.

The Trustee determined that seven people were dependants of the Deceased Member at the time of his death. These were the spouse, a minor son of the Deceased Member and the spouse, the oldest son of the Deceased Member and his first wife, the second son of the Deceased Member and his first wife (the Complainant), the daughter of the Deceased Member and his first wife, the minor stepdaughter (daughter of the spouse) and the stepson.

Having identified the potential beneficiaries, the Tribunal determined the fairness and reasonableness of the Trustee's decision to pay the benefit to the spouse.

Neither the oldest son nor the stepson claimed any part of the benefit and neither of them was financially dependent on the Deceased Member at the time of his death. The Tribunal was of the view that the Trustee's decision operated fairly and reasonably in relation to them.

The Tribunal determined that, given that the daughter did not claim any financial dependency on the Deceased Member, and in light of the dependency of the spouse, minor son and stepdaughter, the Tribunal was of the view that it was fair and reasonable for her not to receive any part of the death benefit.

The spouse was the legal spouse of the Deceased Member at the time of his death, they were living together and he was providing her with financial support. However, the Complainant submitted that the marriage between the Deceased Member and the spouse had ended, and that the Deceased Member did not wish for the spouse to receive 'any part of his superannuation'.

The Tribunal noted that the Deceased Member and the spouse entered into property settlement negotiations in June 2006, but these were never finalised because they reconciled.

The Complainant referred to a letter from the Deceased Member's solicitors indicating that on 6 March 2007, when the Deceased Member made his new will, he informed the solicitors that his marriage had ended.

The spouse indicated, however, that the Deceased Member left for interstate work on 16 March 2007, and on 4 April 2007 the spouse, the minor son and the stepdaughter flew interstate to spend Easter with the Deceased Member. The spouse has stated that on 3 May 2007 the Deceased Member came home for a period of four weeks and left

again on 1 June 2007 to complete work. He died on 15 June 2007.

The Tribunal also noted a letter dated 1 June 2007 from the Deceased Member authorising the spouse to act on his behalf in relation to a motor vehicle matter.

The Tribunal was of the view that the relationship between the Deceased Member and the spouse continued until the death of the Deceased Member, and the spouse was financially dependent on the Deceased Member at the date of his death and had a right to look to him for ongoing support had he not died. The minor son and the stepdaughter lived with the spouse, and payment of the benefit to the spouse would benefit them and assist in meeting their ongoing expenses.

The Complainant had claimed that he had not been paid a market wage while working for the Deceased Member, and that he no longer had a share in the Deceased Member's company. Other than in relation to the business, the Complainant did not claim any financial dependency on the Deceased Member, rather, his claim was based on the wishes of the Deceased Member as expressed in his will.

In the Tribunal's view, the purpose of superannuation is to provide benefits for those who had a right to look to the Deceased Member for financial support in retirement had the Member not died.

The Tribunal was of the view that the decision of the Trustee to pay the benefit to the spouse did not operate unfairly or unreasonably in relation to the Complainant or the joined parties. Accordingly, the Tribunal affirmed the decision.

Defined Benefit Fund – overstatement of value of retirement benefit: D10-11\019

The Complainant was a member of a public sector defined benefit fund. The Complainant requested leave without pay ('LWOP') for the

period 1 February 2001 until 31 January 2002 and, while her membership record reflected this request she did not proceed with the leave and contributory service continued to accrue to her account. The reinstating of the period of LWOP resulted in an erroneous crediting to the Complainant of an additional 48 months' service.

This resulted in incorrect benefit statements being issued to the Complainant, commencing with the 30 June 2005 statement until her final statement as at 30 June 2007, and incorrect account balances being provided to her in the Trustee's financial planning sessions she attended. After the Complainant retired from employment and applied for her benefit the fund advised the Complainant that the benefit estimates she had received were incorrect and paid her the correct amount of the benefit.

Deliberations of the Majority of the Tribunal

It was noted that the Complainant's statement for the period 1 July to 31 December 2004 showed contributory membership of 121 months (as at 31 December 2004) whereas the statement for the period 1 January to 30 June 2005 showed contributory membership of 173 months (as at 30 June 2005), a difference of 52 months in a six month period. Each subsequent 6 month statement to 30 June 2007 included the incorrect additional service and consequent overstated benefit.

The benefit statements received by the Complainant contained disclaimers to the effect that benefits can only be paid in accordance with the Act and Regulations and the Trustee accepted no liability for any loss as a result of any person relying on the information.

About two weeks after the Complainant had retired and applied for her benefit the Fund telephoned her and advised her that her benefit would be approximately \$777,000, which was in line with her expectations as a result of receiving the benefit statements. Some two hours later, after the Fund had

audited the Complainant's record, she was contacted again and advised that the correct benefit payable was approximately \$736,000.

At the conciliation conference the Tribunal directed the Trustee to reconsider the matter through its internal processes as provided under its Regulations. As a result, the Trustee approached the relevant Treasurer to request that the Treasurer determine whether an additional benefit should be paid to the Complainant. The Treasurer concurred with the Trustee's view that special circumstances did not exist to warrant the Complainant receiving a higher benefit.

It was noted, however, that under the deed the Trustee has power to compromise a complaint, enabling compensation to be considered. Accordingly the Tribunal majority considered the issue of whether the Complainant relied on the information and suffered a loss as a consequence.

The Complainant claimed that she relied on the incorrect benefit statements and had planned her retirement around the incorrect figures, stating that she had to "wind back" some of her plans to overcome the shortfall in funds.

The Tribunal majority carefully considered the information provided by the Complainant in relation to the impact of the smaller benefit on her retirement plans and was sympathetic to her disappointment that the benefit was less than the many benefit estimates she had received. In the Tribunal's view, however, there was no loss suffered by the Complainant in the sense of entering into commitments that could not be altered.

It was noted that the Complainant had been planning her retirement carefully, attending seminars and receiving numerous benefit statements. Her benefit entitlement in statements up to 31 December 2004 were increasing by between \$6,000 and \$9,000 (approximately) every six months, but increased by \$54,000 (as a result of the Trustee's error) between 31 December 2004 and the estimate prepared on 19 April 2005.

The Tribunal majority noted that the Complainant did not appear to have queried this large change and, if she had, her record could have been checked prior to her retirement.

The Tribunal majority was of the view that the decision of the Trustee to refuse to compromise the Complainant's complaint operated fairly and reasonably in relation to the Complainant. Although the Complainant's expectation was that she would receive a higher benefit, she had been advised of the correct benefit amount before she had entered any financial commitments, the statements contained disclaimers, and the Trustee advised her of the correct amount of the benefit as soon as the audit of her benefit was conducted.

Deliberations of the Dissenting Member

The Dissenting Member considered that a combination of circumstances made the Trustee's refusal to augment the benefit unreasonable, including: the number of significant errors made by the Trustee; that the Trustee relied on members to identify and raise errors and took no responsibility for identifying errors until it was required to pay a benefit; the unreasonableness of data checking being the responsibility of the client and that the Trustee did not inform the Complainant of this responsibility.

The Trustee's reliance on disclaimers on various documents issued to the Complainant to justify and waive any responsibility for its errors was, in the Dissenting Member's view, inappropriate as the disclaimers commence with wording such as "while every care" or "whilst reasonable care" or wording to that effect. The Dissenting Member determined that the Trustee had not provided care to either of these levels as it had failed to make even basic level reasonableness checks on the data which was critical to the calculation of the benefit.

While the Trustee was able to state that it paid the benefit required under the trust deed, the

Dissenting Member determined that it had misled the Complainant at arguably the most critical time in the relationship between the Trustee and the member - retirement.

Further, the Trustee's approach that the Complainant could not point to an irreversible financial commitment, and as such no loss had been incurred, was misguided. The Dissenting Member pointed to the example of the Complainant's dental work, which she "had no choice but to continue", and asked how the Trustee envisaged that once commenced (prior to retirement) this could be "reversed" during retirement?

In the opinion of the Dissenting Member, retirement is of itself a financial commitment. If the Trustee had advised the Complainant correctly of her benefit entitlement she could very easily, while still employed, have delayed her retirement to achieve the retirement savings goal she thought she had achieved based on the Trustee's repeated advice. The Complainant did not have to demonstrate a specific loss as her financial commitment was to her standard of living in retirement derived in large part from the benefit provided by the Fund.

In the Dissenting Member's opinion, the Complainant was entitled to rely on the Trustee's advice from at least the time she was receiving one on one retirement interviews provided by the Trustee, in order to plan her retirement date and her standard of living in retirement. In the Dissenting Member's view a trustee acting reasonably would have compromised this complaint.

As the majority of the Tribunal, however, was satisfied that the operation of the decision in relation to the Complainant was fair and reasonable in the circumstances it affirmed the decision of the Trustee.

Declined claim for a Total and Permanent Disability Benefit – eligibility: D10-11\020

The Complainant lodged a complaint that the decision of the Trustee to decline payment of a TPD benefit was unfair or unreasonable.

Disablement was defined in the Trust Deed as a state of health which, in the opinion of the Trustee, renders a member permanently incapable of performing duties or engaging in employment for which they are reasonably qualified by training and experience and where the member has been absent from employment through injury or illness for three months within a period of twelve months immediately prior to ceasing to be in employment.

The Tribunal first addressed the issue of the fairness and reasonableness of the Trustee's decision that the Complainant was not absent from his employment through injury or illness for three months within a period of twelve months immediately prior to ceasing employment i.e. in this case 30 November 2005 to 30 November 2006.

The Complainant's sick leave records showed a total of 23 days taken over twelve months. The Complainant's representative calculated 22 days and submitted that allowing for weekends, three calendar months translates to 65.25 days. The Complainant's representative submitted that the 19 days annual leave taken by the Complainant as well as the 26 rostered days off (every second Monday) were absences due to injury or illness. Thus, it was argued, the Complainant had been absent from work through injury or illness for 68 days during the relevant period.

The Complainant's representative provided short statements, in identical terms, by Drs EN and YY. These statements certified that in each of their respective opinions the Complainant was absent from employment due to injury or illness "during the periods of annual leave highlighted in the attached leave records and during at least nineteen of the

twenty-six rostered days off he took" during the relevant period.

In the Tribunal's view, the decision of the Trustee that the Complainant was not absent for the requisite period to be considered eligible for a TPD benefit operated fairly and reasonably in relation to the Complainant for the following reasons: -

- the number of days recorded as sick leave during the relevant period was only slightly more than one third of the required number of days;
- the certifications by Drs EN and Dr YY, identically referring to "at least nineteen" of the twenty-six rostered days off, are not supported by any evidence of consultations or opinion as to on which of the rostered days off the Complainant may have been unwell. In the Attending Doctor's Medical report, completed by Dr EN on 27 November 2006, she recorded that the Complainant consulted her once every two to three months on average;
- even if nineteen of the rostered days off were due to injury or illness, and all the annual leave similarly caused, the Complainant's total absence would be 61 days, less than the required 65.25 days as calculated by the Complainant's representative;
- further, there was no evidence that the Complainant would have been permitted to attend work on his rostered day off if he had been well; and
- the Complainant had not exhausted his sick leave at the time of cessation of employment so it was not necessary for the Complainant to use annual leave during periods he may have been absent due to injury or illness.

In the Tribunal's view the decision of the Trustee that the Complainant was not eligible to be considered for a TPD benefit, as he was not absent from work because of injury or

illness for the requisite period, operated fairly and reasonably. Given this, it was not necessary for the Tribunal to determine the fairness and reasonableness of the Trustee's decision that the Complainant was not permanently incapable of performing duties or engaging in employment for which he was reasonably qualified by training or experience. Accordingly, it affirmed the decision of the Trustee.

Death benefit – daughter complains about decision to pay total benefit to her half-sister: D10-11\021

The Complainant lodged a complaint in relation to the decision of the Trustee to pay 100% of her father's death benefit to her half-sister as a financial dependant.

The Complainant is the adult daughter of the Deceased Member and a former de facto partner from whom he had separated when the Complainant was an infant. Following the separation the Complainant had no contact with the Deceased Member until towards the end of her secondary schooling when the Complainant regained contact with him. She began to spend time with the Deceased Member and her half sister, staying in their home on occasions, and continued to have irregular but frequent contact with the Deceased Member until shortly prior to his death in December 2007.

The Complainant's half-sister is the Deceased Member's daughter as a result of a marriage which occurred after the separation of the Deceased Member and the Complainant's mother. The marriage also ended and, for a substantial period prior to the Deceased Member's death, the half-sister had been living with the Deceased Member.

The Deceased Member expressed no wish in relation to the proposed payment of the Fund death benefit. By his will dated 23 March 1985 the Deceased Member left his estate to his children in equal shares. However, the Tribunal noted that the will pre-dated the Deceased Member's Fund membership by

many years, was written when the Complainant and her half-sister were small children and was dated about 22 years prior to the death of the Deceased Member. As such, the Tribunal determined it would have been reasonable for the Trustee to have accorded only minimal weight to the general expression of intent contained in the will.

In her statement of financial circumstances filed with the Tribunal the Complainant disclosed she had a life partner and that, at the date of death, their combined income was in the vicinity of \$45,000 and that she had accumulated a small amount by way of savings. Her income and that of her partner significantly increased since that time and she had received the proceeds of her share in the estate of the Deceased Member.

The Complainant also disclosed some small financial contributions she had received from the Deceased Member although these appear to have been very occasional and to have mainly occurred several years prior to his death. In the view of the Tribunal these financial contributions seemed insufficient to ground a claim of financial dependency and, accordingly, the Tribunal considered that it was reasonable for the Trustee to have concluded that she was not financially dependent upon him.

The half-sister disclosed in her statement of financial circumstances that she was single with an income of approximately \$50,000 at the date of death and she had a small amount in savings. Since then her income had slightly increased but she had assumed ownership of the home previously owned by the Deceased Member, valued at approximately \$440,000, which was subject to a mortgage of \$193,000 involving repayments of \$540 per month.

The half-sister stated that in April 2006 she had commenced making regular contributions of \$50 per week towards the household constituted by the Deceased Member and herself but these contributions were not always made. It was unclear how she and the

Deceased Member divided other expenses but the tribunal concluded that it was reasonable to assume that the half-sister enjoyed occupancy of the home on either a rent free or reduced rent basis during the period prior to the Deceased Member's death.

The Tribunal considered there was sufficient evidence to justify the Trustee concluding that the half-sister was a financial dependant at the date of death but determined that, having regard to her age and separate income, the degree of financial dependency could only have been partial. Both the Complainant and the half-sister had independent means and neither had demonstrated financial need markedly greater than the other.

As to the existence of an interdependency relationship between the half-sister and the Deceased Member the Tribunal drew the following conclusions: -

- there was clearly a close personal relationship between them as previously stated, although it could not be said that this was of a type involving mutual commitment to a shared life;
- they lived together at the date of his death and had done so, save perhaps for some absences, for several years;
- although each had a separate income source there was a sufficient sharing of these sources of income to satisfy the concept of mutual financial support;

however

- whilst their living arrangements involved some degree of mutual domestic support and personal care it could not be said that this was beyond what might flow from a normal parent child cohabitation.

In the circumstances the Tribunal considered that the relationship between the Deceased Member and the half-sister fell short of an interdependency relationship as envisaged by the *Superannuation Industry Supervision Act*

1993 and the Trustee acted reasonably in not concluding that such a relationship existed.

In the case of the Complainant the Tribunal determined that there was no continuous cohabitation with the Deceased Member.

The Trustee initially made a provisional decision that the benefit should be paid equally to the Complainant and the half-sister as non-financial dependants.

Prior to claimstaking, but apparently following receipt of additional information, the Trustee made a decision to pay the entire benefit to the half-sister as a financial dependant and sent claimstaking letters to the Complainant, the half-sister and the LPR. After reviewing the responses the Trustee affirmed its decision to pay the benefit to the half-sister. The Trustee provided no detailed reasoning in relation to this although it appeared that the half-sister's financial dependency, which it accepted, was a significant factor.

The Tribunal determined that in the present case it would have been apparent to the Trustee that the half-sister was living with the Deceased Member and a financial relationship existed between them. The Trustee concluded that the half-sister was a financial dependant and, except to say that this dependency was partial only, the Tribunal agreed with this conclusion.

The Tribunal determined that it could be said that the half-sister's relationship with the Deceased Member at the date of his death was one involving more continuous physical proximity than that of the Complainant. On the other hand, the reality appears to be that the half-sister was capable of financially supporting herself and that, had the Deceased Member lived, her need for financial support from him may well have lessened and it was reasonable to assume that, at some stage, she may have commenced life away from him.

The Tribunal observed that, relevantly, the competing claimants were adult children and

that there was no spouse or minor child with a claim to the Deceased Member's superannuation benefit. The Tribunal determined that the existence of a degree of financial dependency between the half-sister and the Deceased Member entitled her to priority in relation to the benefit, which could be qualified by the dependency being partial and the fact that, as an adult child with her life ahead of her, its future duration was reasonably subject to question.

Whilst the Tribunal sympathised with the position of the Complainant it considered it was important to restate that its role is to determine whether the decision of the Trustee operated fairly and reasonably in relation to the Complainant and the half-sister in the circumstances. The decision must be guided by the principle that the purpose of superannuation is to provide for the person or persons who might have looked to a deceased member for financial support had the member lived.

Although it might be possible to conclude that a decision to pay a minor portion of the benefit to the Complainant would also have been fair and reasonable nevertheless, in the view of the Tribunal, the decision of the Trustee to pay the entire death benefit to the half-sister was also fair and reasonable. Accordingly, the Tribunal affirmed the decision.

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