



Superannuation
Complaints
Tribunal

SCT Quarterly
Bulletin

Issue No. 59

1 January 2010 – 31 March 2010

Chairperson's Report

Death Benefits

While the Tribunal appreciates the complexity of determining the distribution of death benefits, and understands that each death benefit distribution is different and must be determined having regard to its circumstances, the Tribunal has detected some general trends with respect to death benefit distributions over the last couple of quarters which it considers warrant some comment.

'Partner'

The Tribunal is aware of at least one instance where a trustee determined to pay a death benefit to a person described as the deceased's 'partner' who did not appear to be in a de facto or interdependency relationship with the deceased at the time of death and who appeared to be financially independent of the deceased. Alternatively, in other cases, the nature of the relationship between the deceased and the 'partner' is not described and accordingly the Tribunal does not know what the basis of the 'partnership' is (interdependency, de facto relationship or financial dependency). The *Superannuation Industry (Supervision)* legislation ('the SIS legislation') does not refer to the term 'partner' – while legal and de facto spouses (and children) are automatically deemed to be dependent, a 'partner' would need to establish dependency as either being in a de facto or interdependency relationship at the time of death, or would need to establish financial dependency on the deceased in order to be eligible to be considered to be a dependant.

Interdependency

The Tribunal has had an increase in the number of complainants who – despite never having lived with the deceased – claim an interdependency relationship with the deceased. The Tribunal notes that one of the requirements of an interdependency relationship under the SIS legislation is that the parties live together. The only exceptions to this requirement are where the parties did not live together because 'either or both of them suffer from a physical, intellectual or psychiatric disability' or they are 'temporarily living apart'.

The examples given in the SIS legislation of 'temporarily living apart' include where one of the persons is temporarily working overseas or is in gaol. While the Tribunal determines each complaint on the basis of its own circumstances, it has formed the general view that, in order to be considered to be 'temporarily living apart', the complainant and the deceased need to have been 'living together' in the first instance, prior to the occurrence of the circumstances which gave rise to

their 'temporarily living apart'. Accordingly, if the parties had never lived together it will be difficult for the survivor to argue that they were 'temporarily living apart'.

Moral Judgments

Without trying to underestimate the difficulties in determining the existence, and relative degree, of dependency among various potential beneficiaries, the Tribunal has observed an increasing trend of instances where trustees appear to have been influenced, to varying degrees, by considerations which are more along the line of a 'moral judgment' rather than an objective consideration of needs and reliance. Trustees are obliged to determine the potential beneficiaries by reference to the definition of 'dependant' in accordance with their trust deeds and the SIS legislation, and then evaluate the extent to which each claimant was reliant on the deceased at the time of death and would be likely to have been reliant on the deceased's superannuation into the future. In so doing the trustee should strive to be as objective as possible.

'Claim –staking' – amount of benefit and capacity in which it is being paid

Section 15 of the *Superannuation (Resolution of Complaints) Act 1993* ('the Complaints Act') provides that, for the purposes of the Complaints Act, a person is not considered to have an interest in a death benefit if they have been given written notice about the 'proposed payment' of the benefit and the prescribed period in which they may object (28 days) and the person has not objected within that period.

The Tribunal is aware that some trustees only give written notice as to the intended distribution – the recipients and the proposed proportions – and do not necessarily disclose the amount of the payment and/or whether the beneficiary will be paid as a dependant or non dependant for tax purposes. The Tribunal considers that in such instances, where the amount of the benefit or the tax status has not been disclosed, the 28 day period in which to lodge an objection may not apply to that aspect of any complaint. Accordingly, in such circumstances, a complaint may be made about the amount of the benefit (typically the decision of a trustee or insurer that the insured sum is not payable because of a non-disclosure issue), or the decision as to the tax status of the recipient despite the expiry of the 28 day period with respect to the proposed distribution.

Requirements under s 24A of the Complaints Act

Under s 24A of the Complaints Act, in the case of a complaint about the distribution of a death benefit, a trustee must give written notice to all persons (other than the complainant) whom the trustee believes may have an interest in the outcome of the complaint, within 28 days, or such longer period as the Tribunal allows, after the trustee receives notice of the complaint under subsection 17(1) from the Tribunal. Therefore, a trustee is not required to inform potential beneficiaries of the complaint with the Tribunal until it has received a notice of the complaint under subsection 17(1) from the Tribunal.

When a death benefit complaint is received and there is insufficient information to establish jurisdiction, the Tribunal generally writes to the complainant to obtain this information and also sends a letter to the trustee that a complaint has been received and that the Tribunal is seeking further information from the complainant to establish jurisdiction. This is not a s 17 notice and s 24A is not invoked. (Section 17 notices from the Tribunal are clearly marked as such). However, some trustees are corresponding with beneficiaries on receipt of such a letter from the Tribunal and advising them that a complaint has been lodged with the Tribunal. The beneficiaries then contact the Tribunal seeking to be joined or requesting information regarding the 'complaint'.

The Tribunal is unable to provide information to these beneficiaries if it has not yet established its jurisdiction to deal with the complaint. Accordingly, the Tribunal requests that trustees be aware that a letter advising the trustee that jurisdiction is being assessed is not a s 17 notice, and notification to other parties in accordance with s 24A is not required at that point.

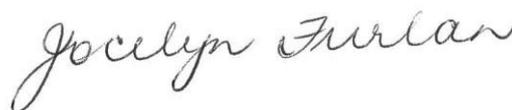
Quarterly Statistics

During the quarter, the total number of written complaints received by the Tribunal increased by 0.5% compared to the previous quarter. The number of telephone enquiries declined by 15.9%.

The number of complaints within jurisdiction relating to fund administration as a percentage of total complaints remained stable at 48.2% (last quarter 47.8%) of all complaints during the quarter. Complaints about death benefit distributions increased to 37.1% (last quarter 35.2%) of all complaints. Complaints about disability benefits remained static, at 9.9% of total complaints.

The Tribunal finalised 604 complaints in the quarter. At conciliation, the Tribunal achieved a settlement rate of 58.5% (previous quarter 71.9%).

Eighteen determinations were issued during the quarter. Overall, the Trustee's decision was affirmed in 72.2% of these cases, but a breakdown shows that 100% of death benefit distribution cases were affirmed, but only 50% each of disability and administration cases were affirmed.



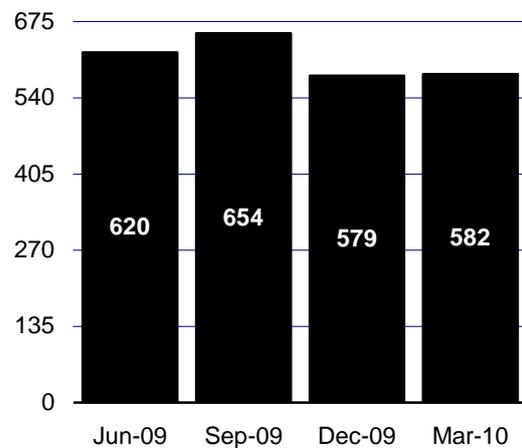
Jocelyn Furlan
Chairperson

Performance

Statistical Overview

Written Complaints

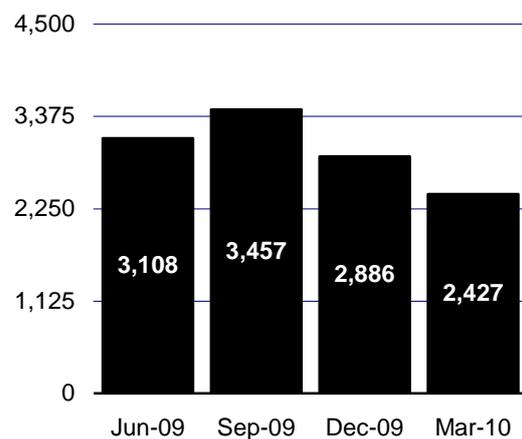
This quarter, the Tribunal received 582 written complaints (last quarter – 579), which is an increase of 0.5% compared with the previous quarter.



Telephone Enquiries

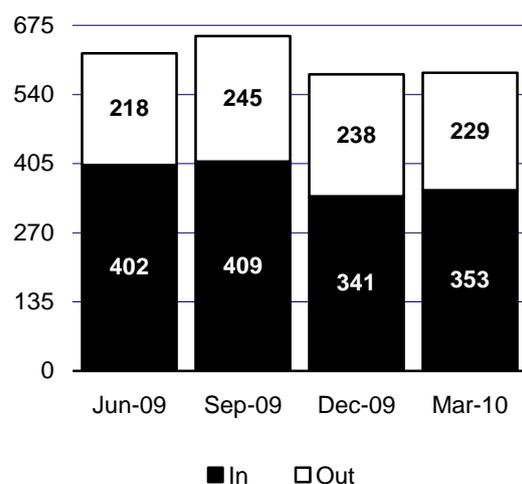
The Tribunal received 2,427 telephone calls this quarter (last quarter – 2,886), which is a decrease of 15.9% compared with the previous quarter.

The Tribunal dealt with a wide range of enquiries, the most popular questions were fund administration enquiries (20.3%), followed by complaint related enquiries (19.2%) and death benefit enquiries (9.8%).



Jurisdiction

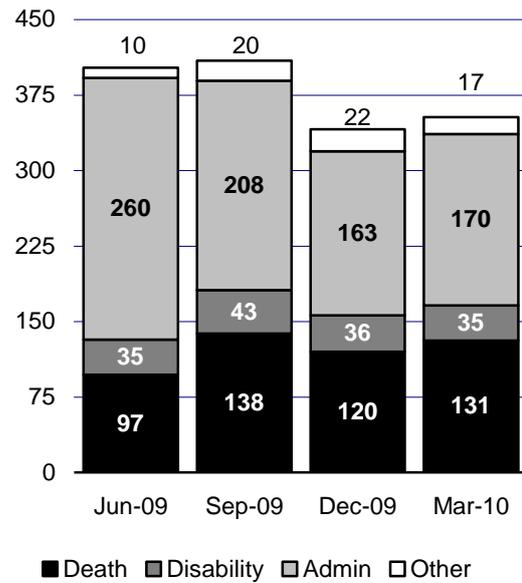
Of the 582 written complaints received this quarter, 353 (60.7%) complaints were within jurisdiction (previous quarter – 58.9%). Of the 229 complaints closed as outside jurisdiction, 151 (65.9%) were closed pursuant to s.19 of the SRC Act because the complainant had failed to lodge a complaint with the Trustee prior to lodging a complaint with the Tribunal, (last quarter – 61.8%).



Nature of Written Complaints Within Jurisdiction

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

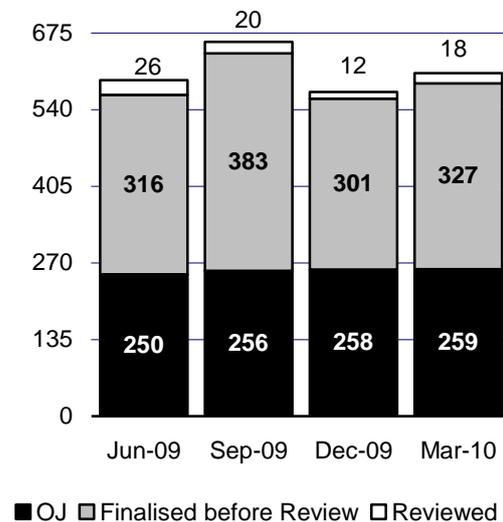
Leaving aside the ‘Other’ category, ‘Administration’ complaints comprised the largest category of all written complaints received within jurisdiction – 48.2% (last quarter – 47.8%). ‘Death’ complaints made up the second-largest category at 37.1% (last quarter – 35.2%), followed by ‘Disability’ at 9.9% (last quarter – 10.6%).



Complaints Finalised

The Tribunal finalised 604 written complaints this quarter, up from 571, or 5.8%, in the last quarter, including some complaints carried over from the previous quarter.

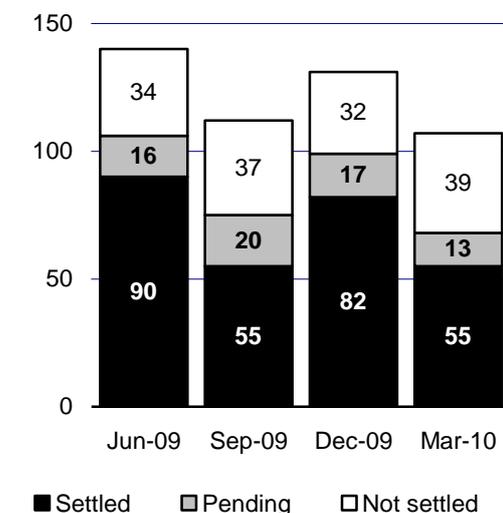
Of the 604 finalised complaints, 3.0% were finalised at review (last quarter – 2.1%), 54.1% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 52.7%) and 42.9% were outside jurisdiction (last quarter – 45.2%).



Conciliation Conferences

The Tribunal conciliated 107 cases in the quarter, a decrease of 18.3% on last quarter's 131.

Of the 94 cases concluded, settlement was achieved in 55, resulting in a settlement rate of 58.5% (last quarter – 71.9%). The outcome is pending in 13 cases (12.1%) compared to 17 cases (13.0%) for last quarter.



Nature of Conciliation Cases

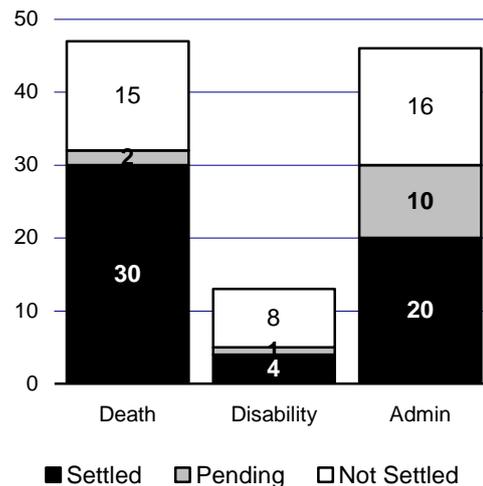
The categories of note in the quarter are as follows:

Death Benefits – Of the 45 concluded cases, 30 (66.7%) were settled.

Disability – Of the 12 concluded cases, 4 (33.3%) were settled.

Administration – Of the 36 concluded cases, 20 (55.6%) were settled.

Other – one matter was settled at conciliation.



Review Determination Outcomes for the Quarter

The Tribunal issued 18 determinations this quarter (last quarter – 12 determinations).

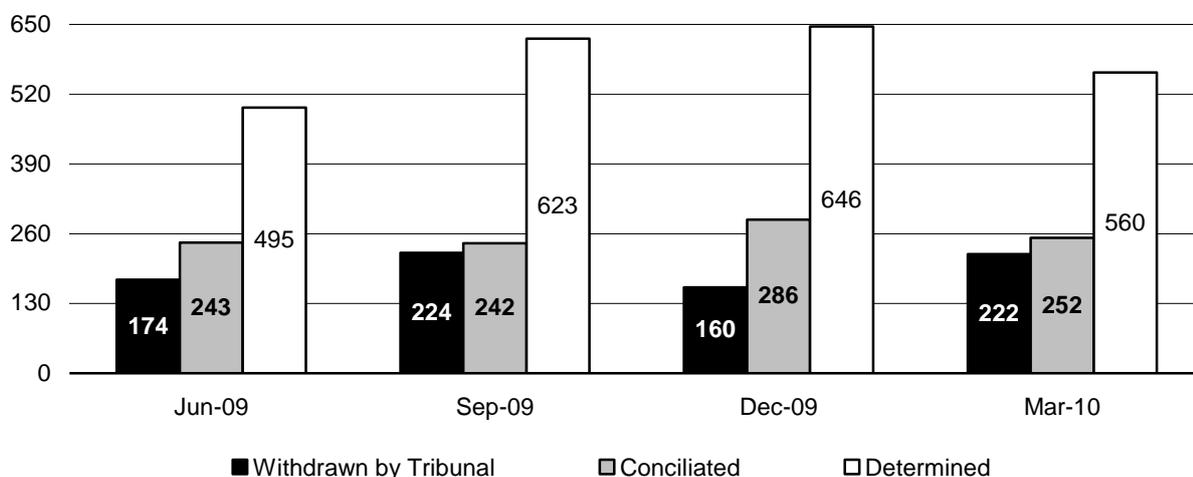
The largest category of complaints determined at review was death complaints – 8 (44.5%). Disability complaints made up the second largest category - 6 (33.3%), followed by administration complaints – 4 (22.2%).

| | Death | | Disability | | Admin | | Other | | Total | | |
|--------------|----------|-----------|------------|-----------|----------|----------|----------|----------|-----------|-----------|--------------|
| | Qtr | YTD | Qtr | YTD | Qtr | YTD | Qtr | YTD | Qtr | YTD | YTD % |
| Affirmed | 8 | 19 | 3 | 12 | 2 | 5 | 0 | 0 | 13 | 36 | 72.0 |
| Remitted | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0.0 |
| Varied | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 2.0 |
| Set aside | 0 | 3 | 3 | 7 | 2 | 3 | 0 | 0 | 5 | 13 | 26.0 |
| Total | 8 | 23 | 6 | 19 | 4 | 8 | 0 | 0 | 18 | 50 | 100.0 |

72.2% of Trustee decisions were affirmed during the quarter, compared with 75.0% in the December quarter and 75.0% in the September quarter.

Efficiency

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



Recent Determinations of Interest

Total and Permanent Disablement Benefit - meaning of “At Work” & “Occupation” under Policy: D09-10\029

The decisions under review were the refusals by the Trustee and the Insurer to pay a total and permanent (TPD) benefit to the Complainant.

The Complainant commenced employment with the Employer as a full time fitter and turner in October 1995 and joined the Previous Fund. In August 1999 he sustained a back injury at work while lifting a wooden platform. He was completely disabled from work for some time and has not worked as a fitter and turner since that time.

In about May 2000 the Complainant returned to his workplace to a different position where he was afforded the title of “Quality Control Inspector”. He performed this role for only 20 hours per week and it was not clear how much actual work he performed in the role. It appeared the balance of his wages was made up by the Employer’s Workers’ Compensation insurer.

On 1 July 2001 the Fund the subject of the complaint took over the provision of superannuation services to the Employer’s employees from the previous fund. The Complainant thereafter continued to “work” in the quality control section of the Employer until 13 February 2004, when he was dismissed because his position was redundant. He has not worked since. He claimed a TPD benefit from the Fund.

Under the Trust Deed, the Trustee was liable to pay a TPD benefit to the Complainant only if the Trustee’s liability was covered by the group Insurance Policy entered into by the Trustee. This only applied in respect of persons who were “at work” when it came into force. An employee was only “at work” for the purposes of the Policy if the employee was “at work for the normal daily hours of work”

and “actively performing the full duties of the normal Occupation for which they were employed”.

The initial issue to be determined was whether the Complainant was “at work” on that day (i.e. 1 July 2001) within the meaning of that expression in the Policy.

The Insurer and the Trustee initially declined the Complainant’s claim on the basis that he was not “at work” on the date that he joined the Fund (successor fund). Subsequently the Insurer decided it was on risk but declined the Complainant’s claim on the basis that he was fit for work at the relevant time and did not satisfy the TPD definition.

The Insurer and the Trustee then argued that the Complainant had not been absent from his “Occupation” for a period of six consecutive months “solely through Injury or Illness” as was required by the definition of TPD in the Policy. They submitted that, for the purposes of the definition of TPD, his “Occupation” was what he was doing when he ceased employment.

The Trustee and Insurer stated that the Complainant became absent from his Occupation in the Quality Control department because he was made redundant, rather than because he was unable to fulfill that role. It appeared that, as a Quality Control Inspector, he had been performing such tasks as the Employer required when he was dismissed.

The crucial step in this argument was the identification of the Complainant’s “Occupation”. If “Occupation”, in the definition of TPD, referred to the member’s job when they first became an employee, then his “Occupation” was fitter and turner not Quality Control Inspector.

The definition of “Occupation” in the Trust Deed referred to the “employment or activity in which the person/Member is principally Employed.” The capitalisation of

“Employed”, in the Deed, pointed to the definition of “Employed/Employment”, which referred to a person “being engaged” in various forms of employment which are further defined in the Policy. The word “engaged” encompasses both the act of hiring an employee and the ongoing employment of an employee.

The Tribunal concluded that, properly understood, the expression “Occupation” in the definition of TPD referred to the occupation of the Member at the time the Member ceased his work - not “fitter and turner” but his “Occupation” in the Quality Control Department. The Complainant did not cease to perform his occupation in the Quality Control Department because of injury but because he was dismissed on the basis of redundancy. Accordingly, he had not been absent from his occupation “solely through Injury or Illness for six consecutive months” as required by the definition of TPD in the Policy. Since his employment was terminated he had not been prevented from pursuing work of a quality control nature by his disability but because he was not trained in that field as he was a fitter and turner by training and experience.

As a result the Tribunal affirmed the Trustee’s and Insurer’s decisions.

The Tribunal observed that such evidence as there was suggested that the Complainant was unable to work as a fitter and turner and that this disability was the result of the injury, which may well mean that the Previous Fund was responsible rather than the Trustee or its Insurer. The issue in this complaint, however, was the fairness and reasonableness of the decisions of the Trustee and the Insurer that the Complainant was not TPD as that term was defined in the Fund’s Trust Deed and the Policy.

The Tribunal acknowledged that it may be argued that it is not “fair” that the Complainant is left without an opportunity to make a claim that he was TPD in accordance with the Previous Fund’s rules. The Tribunal

observed that any unfairness related to this loss of opportunity results from the regime that applied with respect to the Previous Fund and its trustee and insurer, not from the decisions of the Trustee and Insurer of the Fund which were under review.

While the Tribunal affirmed the decision, it observed that the circumstances of this case illustrate the difficulties which can arise on the transfer of members from one fund to another. The Tribunal suggested that it is appropriate for all parties involved in a transfer to take great care to ensure that the position of transferring members, particularly members who are not able to work to full capacity at the time, are carefully considered.

Cancellation of insurance cover: D09-10\032

The Trustee notified the Complainant of its decision that she did not have insurance cover on the basis that it had received from her a document purporting to cancel her insurance cover.

The Complainant commenced employment with Employer 1 in September 2001 and joined the Fund. In approximately December 2001 an undated welcome letter confirmed she had been automatically allocated one unit of death and two units of income protection cover.

On 23 August 2002 the Complainant lodged a member application form with the Fund in respect of her employment with Employer 2 and ticked ‘NO’ in response to the question: ‘Do you want the basic insurance package’. In October 2002 her insurance cover was cancelled. The Trustee was unable to confirm whether the Complainant was notified of this.

The 30 June 2003 annual member statement indicated that contributions were being remitted from Employer 1 and Employer 2, that insurance premiums of \$17.50 had been deducted, that the space for ‘insurance type’ was left blank and that a beneficiary was named. The 30 June 2004, 2005 and 2006

annual member statement indicated that contributions were being received, no insurance premiums had been deducted, the 'insurance type' was 'Nil' and a beneficiary was named.

In late 2006 the Complainant commenced work with Employers 3 and 4 and, in October 2006, she completed a member application form relating to employment with Employer 4 in which she indicated that she was an existing Fund member and requested an application to upgrade insurance. Employer 3 indicated that the Complainant did not complete a member application form but provided superannuation information about her membership of the Fund on an employer form.

On receipt of contributions from Employer 3 the Trustee created two new accounts for the Complainant. Two new welcome letters were sent to her advising her that she had default insurance cover under the Fund. These accounts were later merged into the Complainant's original account but the Trustee cannot confirm whether she was notified that her insurance had been cancelled again.

In January 2007 the Fund system recorded the Complainant's request for an application form for the upgrade of insurance cover and indicated that the request was forwarded for action, although the Fund was unable to provide evidence that an application form was issued to her. On 23 April 2007 the Fund records indicate that the Complainant called the Fund about making a claim on her income protection insurance and was informed that she had no income protection cover. In July 2007 the Trustee notified the Complainant that the application form dated 23 August 2002 was the only application form it had on file.

Relevant to the determination was whether the Fund should have cancelled the Complainant's insurance on receipt of the application form dated 23 August 2002, where, it was agreed, that she had ticked the

'NO' box to the question 'Do you want the basic insurance package?' At issue was whether that form constituted a written notice from the Complainant to cancel insurance and whether the Fund's procedures for cancelling insurance should have been followed i.e. whether the Fund should have first queried her intention and then notified her that insurance had been cancelled.

A related issue was whether the Complainant understood that ticking the 'NO' box would result in her insurance being cancelled. While the Trustee argued that the information in the PDS made it clear insurance would be cancelled, the Complainant said that because she was already a Fund member and had insurance, she believed she was indicating she did not want additional insurance.

Central to both these issues was the design and use of the Fund's application form. There appeared to be confusion amongst the parties as to what documentation was required when a Fund member became employed by another employer. This issue was present again when the Complainant joined Employers 3 and 4. The Trustee stated that some employees fill in more than one application form and that the Fund changed its records depending on the details and requests.

The Tribunal considered, however, that if an employee who is already a member of the Fund completed the form used by new members, it is not unreasonable that they may take the view that they already have insurance and are being asked about additional insurance. Compliance with the Fund's stated procedures for cancelling insurance seem to the Tribunal to be essential if the form is ambiguous in its particular application to existing members compared with new members.

The Tribunal considered that, given the possible ambiguity of meaning when the Complainant, as an existing member of the Fund, ticked the 'NO' box on the application form, it was unlikely to constitute written notice from her to the Trustee to cancel her

insurance and that, further, the Fund failed to follow its own guidelines which appear to be designed to prevent incorrect cancellation of insurance.

The Tribunal had sympathy for the view that members of funds must take some responsibility and should read statements sent to them regularly so that they are fully aware of what was happening to their accounts. However, in this case, this may not have provided sufficient and early warning to the Complainant that there was a problem which needed to be corrected. If she had examined the June 2003 statement it showed that some premiums were deducted, the space was blank under the heading 'insurance type' and a beneficiary was named. It was only in later years that the word 'nil' appeared on statements in relation to insurance cover.

The Tribunal noted that the Complainant received two welcome letters to the Fund in relation to her employment with Employer 3. Both stated that she had default insurance cover. The Tribunal considered it fair and reasonable for her to assume from these letters that she had cover under the Fund. Further, there was no evidence before the Tribunal that the Fund ever notified the Complainant that this cover had been cancelled at the time her accounts were merged.

Accordingly, the Tribunal determined to set aside the decision of the Trustee and substitute its own decision that the Complainant be entitled to reinstatement of 1 unit of death and 2 units of income protection cover from the date her cover was cancelled by the Fund in 2002, subject to the payment of all the relevant premiums from the superannuation account held by her with the Fund.

Refusal to grant insurance cover: D09-10\034

The Complainant made an enquiry of the Trustee about effecting salary continuance insurance cover and was subsequently sent a

product disclosure statement and a personal statement for completion. On 28 April 2005 the completed personal statement was received by the Trustee and the statement was sent by the Trustee to the Previous Insurer on the same day.

On 16 May 2005 the Previous Insurer e-mailed the Trustee requesting that the Complainant re-answer questions 29(a) and (b) of an attached personal statement supplement. On 18 May 2005 the Trustee sent a letter to the Complainant requesting that she answer questions 29(a) and (b) and 32. On 19 May 2005 the Complainant commenced a voyage with the Employer to the Antarctic, during which she developed severe shoulder pain. As a result of this she ceased work on 4 July 2005 and has not returned to work since.

By the time the letter enclosing the statement would have been delivered to the Complainant she had left to go on the voyage to the Antarctic. Consequently, she did not receive the letter until her return. In the meantime, however, because she was injured on the sea voyage and was unable to work, she was, therefore, no longer eligible for the insurance.

On 27 June 2005 the Trustee sent a letter to the Complainant advising her that her answers to questions 29(a) and (b) were still outstanding. On 30 June the Trustee terminated the insurance policy with the Previous Insurer and effected a replacement policy with the Insurer. At this date the insurance applied for by the Complainant had not been effected because the underwriting assessment had not been completed. In July 2005, on her return from the Antarctic, the Complainant completed the answers to questions 29(a) and (b) of the personal statement supplement and returned it to the Trustee, which subsequently sent it to the Insurer.

In January 2006 the Complainant's employment with the Employer was terminated. In February the Complainant was

advised by the Trustee in a telephone discussion that her application for insurance had not been accepted. In March the Trustee sent a letter to the Complainant confirming that the application for insurance had not been accepted by the Insurer.

The personal statement completed by the Complainant in relation to her application for insurance contained a number of pre-printed questions which she was required to answer. Question 14 asked whether she had any other insurance. In response to that question the "Yes" box initially had a cross inserted in it which was then crossed out and a cross was inserted in the "No" box.

Altered answers to questions 29(a) and (b) were central to the complaint. Question 29(a) asked whether the person completing the statement had a heart complaint, high blood pressure or high cholesterol. Question 29(b) asked whether the person completing it had epilepsy or any neurological disorder. In relation to both questions, the "No" box had a cross inserted but for both there was a crossing-out in the "Yes" boxes.

In the heading of question 29 it was stated "If you answer "Yes" to any item in this question please give details at Question 32". Question 32 asked "Did you answer "Yes" to any item in question 27, 29 or 30?"

In answer to this question the Complainant marked the "No" box with a cross. By her answer to question 32 it was the view of the Tribunal that she clearly indicated to the Previous Insurer that she had answered "No" to all of the questions in question 29.

In question 33, in response to a question on the reason for the last check-up or consultation with her usual doctor, the Complainant answered "Antarctic Medical. Result Passed-Very Healthy". In response to a further query in question 33, as to any medication prescribed, referral given or tests ordered, she answered "Full examination & blood screening for Antarctic Medical performed by Dr (M)".

It was the view of the Tribunal in relation to these answers that, although the Complainant had not initialled the crossing-out in the "Yes" box in questions 29(a) and (b), she was indicating to a reasonable insurer that her answers to these questions were "No". This was confirmed by her "No" answer to question 32 referred to above and her statements that she was very healthy and had passed a full examination and blood screening in a medical examination for travelling to the Antarctic.

Several factors led to the Complainant's application not being accepted. Her personal statement was sent to the Previous Insurer by the Trustee on 28 April 2005 and it was not until 16 May that the Previous Insurer emailed a request to the Trustee for her to answer again questions 29(a) and (b). The Complainant left on an extensive voyage to the Antarctic on the day after the Trustee sent her the letter dated 18 May asking that she complete again the answers to those questions.

She was then injured during the course of that journey before she had any opportunity to meet the request of the Previous Insurer. Because of her injuries, she was unable to work again after completing that voyage. The consequence of these events was that the application for insurance was not accepted.

In the circumstances set out above it was the view of the Tribunal that a reasonable insurer would have taken the view that the answers to both questions 29(a) and (b) were "No", having regard to the rest of the material in the personal statement. In those circumstances, a reasonable insurer would have regarded the application as being acceptable.

It was therefore the view of the Tribunal that the decision of the Previous Insurer not to accept the application, at the time it was received, was not fair and reasonable in its operation to the Complainant in the circumstances. Accordingly, the Tribunal determined that the decision of the Previous Insurer should be set aside and a decision

substituted that the insurance application should be treated as having been accepted by the Previous Insurer and the Complainant regarded as insured at the time the policy with the Previous Insurer was replaced with the policy with the Insurer in July 2005.

Refusal to refund insurance premiums: D09-10\037

The decision under review is the Trustee's decision not to refund the total of the insurance premiums for death and total and permanent disablement ('TPD'), plus interest, deducted from the Complainant's account by the Transferring Trustee.

The Complainant joined the Transferring Fund in 1998 and at that time elected in writing to opt out of insurance cover. It was not until September 2007, when consolidating his superannuation accounts prior to retirement, that the Complainant became aware of the fact that premiums had continued to be deducted from his account.

When the Complainant joined the Transferring Fund in October 1998 he was given a membership number ('First Membership Number') and by statutory declaration he opted out of the automatic death and disablement cover that was available to fund members at that time.

His position with the Employer was made redundant on 13 October 2000. At about the same time he moved from an Old Address to a New Address and advised the Employer of the New Address. The Transferring Fund had recorded the Complainant's address at the New Address as from 13 October 2000.

The Complainant resumed working for the Employer on 9 April 2001 at which time the Employer recorded his address at the New Address. The Transferring Fund recorded the receipt of the Employer's contributions for the Complainant from April 2001 against a new membership number ('Second Membership Number'). Under the Second Membership Number the Complainant was

noted by the Transferring Fund to have 'No Cover' and the figure of '0.00' is noted next to the 'death/tpd premiums' column in the member summary dated 25 July 2001.

From 18 August 2001 the Complainant's membership number changed again ('Third Membership Number'). There were no deductions for premiums until 12 December 2002, from when premiums continued to be deducted until May 2007.

The Transferring Fund's annual member statements for 2004 to 2007 were sent to the Complainant at the Old Address and recorded his member number as the Third Membership Number.

In March 2005 the Complainant terminated his employment with the Employer and, eight months later, on 1 December 2005, his occupation was re-classified by the Transferring Fund from 'Heavy Skilled' to 'Heavy Unskilled', which increased the premiums. On 30 June 2007, pursuant to the Transfer Deed, the Complainant's benefit was transferred to the Trustee of the Fund.

At no time was any correspondence or notice from the Transferring Trustee or the Trustee addressed to the Complainant at the New Address.

In view of the conflicting and incomplete information recorded in the documents provided by the Trustee, it was the Tribunal's assessment that it was unfair and unreasonable for the Complainant not to receive a refund of the premiums deducted. The failure to ensure that the Complainant's address had been updated and cross-referenced on all records relating to his account was significant.

The Tribunal found that there was a very high level of uncertainty in the Trustee's records, and those of the Transferring Trustee, about the Complainant's membership status with the Transferring Fund, and it noted the errors and inconsistencies in the way he was treated. On balance, and in the absence of any proof to the

contrary, it was the Tribunal's view that the evidence supported the Complainant's claim that he had opted out of any insurance benefits and would not have countenanced the payment of premiums had he been aware that the Transferring Fund had, without authority, commenced deductions in December 2002.

Having determined that it was unfair and unreasonable for the Complainant not to be refunded all of the premiums deducted from his account, the next issue for the Tribunal was whether the Trustee of the Receiving Fund was liable to refund those premiums deducted by the Transferring Fund. The Trustee argued that it should not be responsible for the repayment to the Complainant of the full amount of the premiums deducted after 12 December 2002 because it was of the view that no fault lay with it.

The Tribunal determined that the Trustee could not hide behind the contractual arrangements it stated it had made with the Transferring Trustee and any insurer. It observed that there were indemnity arrangements between the Trustee and the Transferring Trustee and its obligations to the Complainant, as the Receiving Trustee, were set out in the Transfer Deed. The Tribunal noted with approval the fact that the Trustee had offered some compensation but considered that its offer was not sufficient and ought to be increased so that the Complainant was fully reimbursed.

Accordingly, the Tribunal determined to set aside the decision under review on the grounds that it was not fair and reasonable and substituted its own decision that the premiums deducted by the Transferring Fund be paid in full to the Complainant by the Trustee of the Receiving Fund.

Death benefit - mother as interdependent/financial dependent: D09-10\039

The Trustee decided to pay 100% of the benefit resulting from the death of the

Deceased Member to the Mother as an interdependent. The Father of the Deceased Member lodged a complaint with the Tribunal because, in his view, the Deceased Member and the Mother were not in an interdependency relationship as that term is defined in the Trust Deed of the Fund and the *Superannuation Industry (Supervision) Regulations 1994* ('SIS').

On his membership application form the Deceased Member had made a non-binding nomination of his Mother as his preferred beneficiary to receive all of his death benefit. The Deceased Member did not leave a Will and Letters of Administration were granted to the Mother.

The Trustee initially proposed that, as it could not identify any person who would qualify as a dependant, it would therefore pay the death benefit to the Mother as the Legal Personal Representative of the estate of the Deceased Member. The Mother objected to this decision.

Following the provision of further information, including a statutory declaration by the Mother to support a claim for interdependency, the Trustee decided to pay the death benefit to the Mother as an interdependent.

In order for the Mother and the Deceased Member to meet the SIS definition of being in an interdependency relationship, each of the following criteria must be satisfied:

- they must have a close personal relationship; and
- they must live together; and
- one or each must provide the other with financial support; and
- one or each must provide the other with domestic support and personal care.

The statements before the Tribunal from the Mother and her partner (the the Deceased Member's stepfather) claimed that there was a close personal relationship between the

Deceased Member and the Mother. The Tribunal observed that there was no additional information attesting to the relationship. However, there appeared to have been regular contact as evidenced by the consistent support given to the Deceased Member, in times of need, by the Mother and the Stepfather. The Tribunal was of the view that the relationship between the Deceased Member and the Mother was a close personal one but appeared to the Tribunal to be no more than a supportive relationship between a parent and an adult child who had some financial and other difficulties.

In relation to the requirement that they must live together, it appeared to the Tribunal that they were living together at the time of the Deceased Member's death, albeit for only three months before death. It was argued by the Complainant that the arrangements were insufficient to satisfy the living together requirement, and that the arrangement was in the nature of a boarder and was likely to end. The Tribunal noted that the Deceased Member had moved to the State where his mother resided, and had been assisted to do this by his Stepfather, and that he had started a new job. There was no indication that he was about to leave the home or the State, other than in the statement of the Complainant. However, nor was there any indication that there was a commitment to a shared life between the Mother and the Deceased Member.

In relation to the provision of financial support, it appeared to the Tribunal from the Statements before it that the Mother, and, by extension, her husband, the Stepfather, provided the Deceased Member with financial support over a period from at least 2001 when the Complainant moved to another State. There was evidence of assistance to the Deceased Member in getting accommodation and guaranteeing loans, some of which appeared to be of mutual benefit to the finances of the Mother, the Stepfather and the Deceased Member (e.g. selling half the house to the Deceased Member). Prior to death, the Deceased Member was said to have

contributed to the financial running of the household.

The Tribunal noted that the Deceased Member had, on his application to join the Fund, expressed the wish that the Mother be his beneficiary and that the application was completed only a short time before his death.

The Mother and the Stepfather stated that they and the Deceased Member provided each other with domestic support and personal care by their sharing of domestic duties, cleaning and care of pets. This may represent elements of domestic support but did not, in the Tribunal's view in the circumstances of this complaint, represent the level of personal care required to meet the definition of interdependency.

Taking into account all of the circumstances of the relationship between the Deceased Member and the Mother, and having regard to the matters set out in SIS, on balance the Tribunal was of the view that the requirements for the existence of an interdependency relationship were not met in this case. There were no exceptional circumstances that moved the relationship beyond a loving and supportive relationship of mother and adult child, no evidence of a commitment to a shared life and a sufficient level of personal care was not demonstrated.

The Tribunal, however, did find evidence in the statements of the Mother of partial financial dependency. The Deceased Member contributed to the running of the house by paying for food and by paying one third of the amount of utility bills, thus increasing the quality of the Mother's life.

Accordingly, the Tribunal regarded the Mother as a dependant of the Deceased Member in accordance with the definition of "dependant" in the Trust Deed as a result of her being partially financially dependent on the Deceased Member.

Having found that the Mother was partially financially dependent on the Deceased

Member, and therefore a "dependant" as that term is defined in the Trust Deed and SIS, and having further found that on the evidence the Complainant was not a dependant of the Deceased Member at the date of the Deceased Member's death, the Tribunal was satisfied that the Trustee's decision to pay the benefit to the Mother was fair and reasonable in the circumstances because of the Mother's dependency relationship with the Deceased Member.

Accordingly, the Tribunal affirmed the decision.

Failure to switch account balance to Capital Secure Portfolio investment option: D09-10\043

The decision under review was the refusal by the Trustee to compensate the Complainant for losses incurred as a result of the failure of the Trustee to switch the Complainant's account balance to the Capital Secure Portfolio investment option.

On 8 September 2008 the Complainant sent an email to the Trustee requesting that an investment switch application form be sent to him by mail. On 26 September he completed the form and returned it to the Trustee. The Fund acted on the request effective as from 29 September and issued an acknowledgement letter dated 3 October. The letter did not specify that only future contributions and transfers had been switched to the Capital Secure Portfolio investment option.

The Complainant telephoned the Fund on 15 December 2008 when he discovered that his investment options were not as he had intended them to be. He stated and advised that it was his intention to transfer his entire account balance to the Capital Secure Portfolio investment option but that he misunderstood the directions on the form.

It was clear to the Tribunal that the Complainant had decided to switch into the Capital Secure Portfolio investment option

and that, whilst he had not been able to present the Tribunal with evidence to support his contention that he meant the switch to apply to his current superannuation balance, it was likely that this was his intention at the time he completed the switch form.

The switch form at Step 2, "Choose your Investment Options", stated that the member was to choose any or a combination of the named investment options, indicate the percentage to apply to each option and ensure that the percentages selected added up to 100%. It then stated under this table of options "(select an option) ✓".

The form further stated "If you wish to allocate contributions and transfers in different percentages to your super account you MUST complete 2 separate forms."

It went on to state:

I elect to change my investment options as detailed below. My change is to apply to:

My future contribution and transfers, or

My current super account that is invested in my chosen investment options.

The Complainant ticked the Capital Secure Portfolio option, indicated the percentage at 100% and ticked the first box relating to future contributions and transfers. He did not tick the second, super account, box.

The Complainant contacted the Trustee on 15 December 2008 after checking his account balance on the Fund website and noting that his intended changes had not occurred. The transcript of the Complainant's discussion with the Fund's representative on that date suggests that it was only at this point, after the consultant had talked him through the switch form, that he realised that he had misunderstood what was required and suggested to the consultant that the form was very confusing.

The Fund's representative suggested that the Complainant complete another form which he could download from the website and urgently fax to the Fund administrator to make the required changes to his account. The Complainant did not lodge any further switch request and has explained that his decision not to do this was based upon his belief that investment markets at that point had fallen as far as they were going to and he had already incurred most of the losses he was likely to incur.

The Tribunal was of the view that, whilst the investment switch form titled "Changing Your Investment Options" may be potentially confusing to an ordinary person, there is an overt invitation on the front of the form to contact the Fund for assistance if a member is unsure of what is required. The Complainant, on the face of it, completed the form correctly and, at the time of completing the form, did not contact the Fund or otherwise indicate that he found it confusing. It was only when he spoke with the Fund's representative that he realised that he had misunderstood what was required and came to the view that the document was confusing.

The Tribunal considered that if the Complainant had turned his mind to the responses required in Step 2 of the form and had found them confusing, he had, at that point, the opportunity to contact the Fund to clarify the requirements. The fact that he completed the form correctly, answering each required point, suggests that he misunderstood what he was doing rather than being confused.

The critical fact in the Tribunal's view, was that the Complainant, when faced with the alternatives for the switch (contributions/transfers or account balance) chose contributions/transfers. The Tribunal felt that it could not overlook that the form had apparently been correctly completed or that, to the extent that he found the form confusing, the Complainant should have contacted the Fund as invited to in the form.

Notwithstanding the deficiencies in the switch form the Tribunal was of the view that members have to take some responsibility for ensuring that they fully understand the forms provided to them rather than simply interpreting them as best they can. In this particular case, the offer of help was highlighted in the form.

Nevertheless, given that the investment switch form submitted by the Complainant was correctly completed in each section and clearly indicated on Step 2 of the form that he wanted the investment selection to apply only to his future contributions, the Tribunal was of the view that the decision of the Trustee to reject the Complainant's claim for compensation was fair and reasonable in its operation in relation to the Complainant in the circumstances.

Accordingly, the Tribunal affirmed the decision of the Trustee.

The Tribunal made further observations that, in its view, the Trustee's switch form and the acknowledgement letter were poorly drafted and fell short of standard industry practice at the time. It is critical that trustees ensure that forms are clear and readily understandable so that there can be no misunderstanding by members.

Further, the Tribunal was of the view that the letter confirming the investment switch would be more useful if it confirmed the type of switch made (i.e. it confirmed whether the account balance had been switched, or future contributions and transfers, or both).

Registration Form

If you wish to be included on the Tribunal's regular mailing list for receipt of the Quarterly Bulletin, please complete the form below and send to:

Superannuation Complaints Tribunal
Locked Bag 3060
GPO MELBOURNE 3001

Telephone 03 8635 5500
Facsimile 03 8635 5588

or email details to the Tribunal at subscriptions@sct.gov.au.

If you would like to receive a copy of the Quarterly Bulletin by email please provide your email address below.

Name

Address

Telephone

Email

Feedback and Registration Form

We welcome any information you can provide for the improvement of this Bulletin.

The information provided from this feedback and your suggestions will be valuable for the production of future editions.

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

Very useful Quite useful Not useful Not useful at all

Comments

Do you want to continue receiving the Bulletin? Yes No

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

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

Please provide your email address:

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

This form can be faxed to 03 8635 5588 or mailed to:

Bulletin Feedback
Superannuation Complaints Tribunal
Locked Bag 3060
GPO MELBOURNE VIC 3001