



## Chairperson's report

### Complaints about death benefits paid on trust

From time to time the Tribunal receives complaints from people concerned about the fitness of a person appointed as a trustee for the purposes of receiving a death benefit on behalf of a minor beneficiary. For example, the Tribunal might receive a complaint from the grandparent of a minor, not complaining about the trustee's decision to pay the benefit to the minor, but, rather, complaining about the trustee's decision to pay the mother of the minor in trust for that minor. The complaint usually concerns the fitness of the nominated person to be the trustee of the benefit.

However, under s14 and s15 of the *Superannuation (Resolution of Complaints) Act 1993* (the Complaints Act), to make a complaint about the payment of a death benefit a person must:

- have or claim to have an 'interest in the benefit' (s15(1)(a)(i))
- claim that they are entitled to benefits through a person with an interest (s15(1)(a)(ii))
- or
- be able to make the complaint 'acting for' such a person (s15(1)(a)(iii)).

In relation to s15(1)(a) the Federal Court has said:

*The purpose [of s 15(1)(a) of the Complaints Act] is to provide a person who, subject to a lawful decision of the trustee in that person's favour, may have an entitlement in respect of a death benefit, to lodge a complaint under the Act that a decision of a trustee in relation to the benefit that has resulted in the person having no entitlement or an entitlement less than that claimed, was unfair or unreasonable. ...a complainant, to fall within s15(1)(a)(i), must be a person whose claim, if successful, would result in that person having an interest in or entitlement (or greater entitlement) to the death benefit or part thereof.*

*(Collins & Anor v AMP Superannuation Limited & Anor (1997) FCA 643)*

In the example described above, the grandparent:

- is not claiming to be a dependant or to be the legal personal representative of the deceased member. They therefore do not have an interest in the benefit and they are not a person to whom the benefit could be paid
- is not claiming an entitlement for themselves through such a person
- in light of the mother's parental/guardian role, cannot demonstrate a capacity that would permit them make the complaint on behalf of the minor beneficiary.

The complaint to the Tribunal is made on the basis that it is accepted that the minor child should be entitled to the death benefit. The successful resolution of the complaint would not appear to involve disturbing the trustee's decision with

respect to the persons who are to be the beneficiary/ies of the benefit.

Any involvement by the grandparent in the fund's decision making processes about the payment of the benefit does not confer standing on the grandparent. The concern of a person such as a grandparent will not, of itself, provide capacity to make the complaint 'acting for' the minor child.

Accordingly, the Tribunal advises persons who make these types of complaint that they do not have standing to make the complaint.

### **Thank you to trustees**

Some trustees will be aware that there are a large number of complaints currently before the Tribunal that are waiting to be allocated to complaints analysts. In May the Tribunal wrote to trustees providing them with a list of the complaints in respect to their fund(s) awaiting allocation.

The Tribunal appreciates the efforts of trustees who have taken the opportunity to revisit the complaints and continue with their own efforts to resolve matters. To date 18 complaints have been resolved.

The Tribunal is receiving additional federal government funding to deal with the build up of complaints. There are approximately 550 complaints identified as 'backlog'. We have recruited additional staff to form a project team who will work on these complaints.



**Jocelyn Furlan**

**Chairperson**

## **Statistical overview**

### **Quarterly statistics – April to June 2013**

#### **Telephone inquiries**

The Tribunal received 2,961 telephone calls this quarter (last quarter – 2,754), which is an increase of 7.5% compared with the previous quarter.

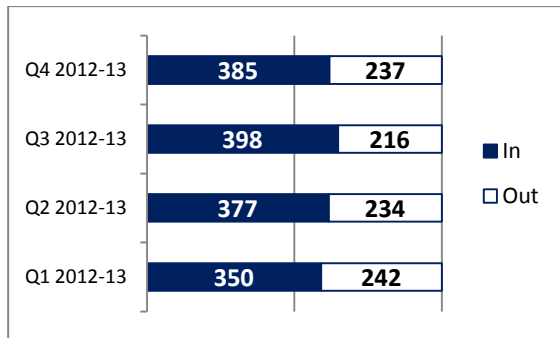
The Tribunal dealt with a wide range of inquiries, the most popular were queries about the Tribunal itself (48.3%), followed by complaint related inquiries (17.0%).

#### **Written complaints**

This quarter, the Tribunal received 622 written complaints (last quarter - 614), which is an increase of 1.3% compared with the previous quarter.

#### **Jurisdiction**

Of the 622 written complaints received this quarter, 385 (61.8%) complaints were within jurisdiction (previous quarter – 64.8%). Of the 237 (38.1%) complaints closed as outside jurisdiction, 144 (60.7%) were closed pursuant to s.19 of the Complaints Act because the complainant had failed to lodge a complaint with the trustee or the 90 day time limit had not passed from the date of complaint to the trustee, (last quarter 61.6%).

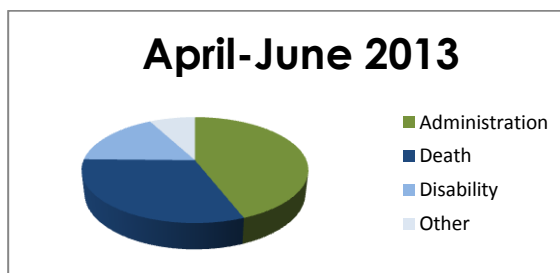


Complaints within jurisdiction

### Nature of written complaints within jurisdiction

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

Administration complaints comprised the largest category of all written complaints received within jurisdiction – 44.1% (last quarter – 48.5%). Death benefit complaints made up the second-largest category at 31.2% (last quarter – 28.1%), followed by disability at 16.9% (last quarter – 17.1%). Other complaints made up 7.8% (last quarter – 6.3%).



Nature of written complaints within jurisdiction

## Performance

### Complaints finalised

The Tribunal finalised 576 written complaints this quarter, an increase of 7.2% compared to the previous quarter.

Of the 576 finalised complaints, 8.2% were finalised at review (last quarter 6.6%), 45.3% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 46.7%) and 46.5% were outside jurisdiction (last quarter 46.7%).

### Conciliation conferences

The Tribunal conciliated 128 cases in the quarter, an increase of 103.2% on last quarter's 63.

Of the 99 cases concluded, settlement was achieved in 51, resulting in a settlement rate of 51.5% (last quarter – 44.8%). 29 cases (22.6%) were adjourned in the quarter (last quarter – 5).

### Nature of conciliation cases

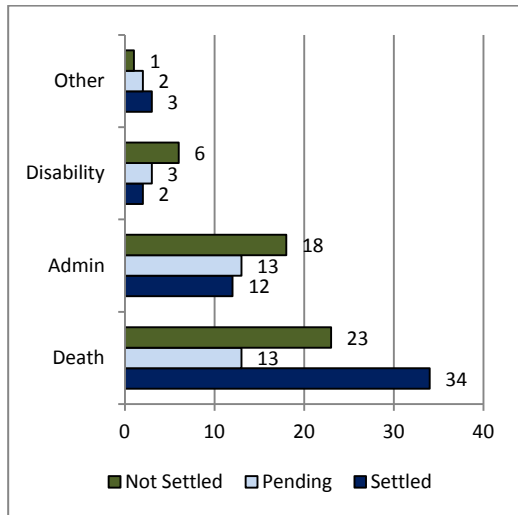
The categories of note in the quarter are as follows:

Death benefits – Of the 57 concluded cases, 34 (59.6%) were settled.

Administration – Of the 30 concluded cases, 12 (40%) were settled.

Disability – Of the 8 concluded cases, 2 (25%) were settled.

Other – Of the 4 concluded cases, 3 (75%) were settled.



Settlement by conciliation

### Review determination outcomes for the quarter

The Tribunal determined 47 cases this quarter (last quarter – 35 cases).

The largest category of complaints determined at review was administration complaints: 21 (44.7%)

Admin	Qtr	YTD
Affirmed	16	58
Remitted	1	1
Varied	1	1
Set aside	3	8
<b>Total</b>	21	68

Disability complaints made up the second largest category: 14 (29.8%)

Disability	Qtr	YTD
Affirmed	11	32
Remitted	0	0
Varied	0	0
Set aside	3	7
<b>Total</b>	14	39

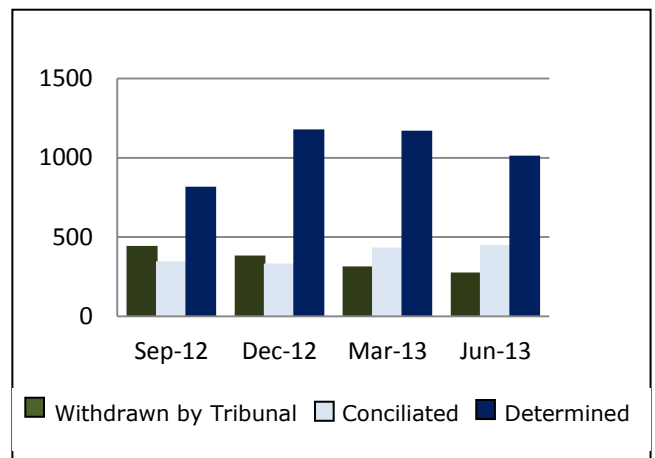
Followed by death benefit complaints: 12 (25.5%)

Death	Qtr	YTD
Affirmed	4	11
Remitted	0	1
Varied	0	0
Set aside	8	13
<b>Total</b>	12	25

66.0% of trustee decisions were affirmed during the quarter, compared with 88.6% last quarter.

### Efficiency

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



## Recent determinations of interest

### **D12-13\081. Death benefit**

*The Complainant argued that the De facto Spouse and the Deceased Member were not in a de facto relationship at the time of the Deceased Member's death and, therefore, she was not entitled to a share of the death benefit. The Tribunal found the Trustee's assessment of the Deceased Member's relationship with the De facto Spouse and the subsequent apportionment of the benefit fair and reasonable and affirmed the Trustee's decision.*

The decision under review was that of the Trustee's to pay the death benefit to the Deceased Member's Spouse, the De facto Spouse and the Youngest Daughter in equal proportion. The Spouse, who was separated from the Deceased Member, claimed that the Deceased Member was not in a de facto relationship with the De facto Spouse at the time of his death. The De facto Spouse claimed that she had been in a de facto relationship with the Deceased Member for a period of eight months prior to his death. The Youngest Daughter, who had turned 18 less than two weeks before his death, was a student and was receiving financial support from the Deceased Member. He also had two other adult children.

In making its decision, the Trustee considered the definition of 'dependant' under the trust deed. The Trustee determined that the Youngest Daughter

was a dependant as she was the child of the Deceased Member and was financially dependent on him at the time of his death. The Trustee also considered the definition of 'spouse' under the trust deed. Spouse was defined as a person legally married to the member or former member at the time of the member's death and/or a 'person who, in the opinion of the Trustee, ordinarily lived with the member or former member on a permanent and bona fide domestic basis prior to the member's death'.

The Complainant claimed that it was not fair and reasonable for the Trustee to conclude the De facto Spouse was in a 'permanent and bona fide domestic relationship' with the Deceased Member at the time of his death. She argued that the relationship was only casual.

The factors not in dispute between the parties were that the Deceased Member and the De facto Spouse were in a relationship for approximately 8 months, a sexual relationship existed between the parties, there was no joint ownership or acquisition of property by the parties, and they did not care and support children on the basis of their relationship – although the De facto Spouse claimed that they were both involved in the care of her daughter.

The De facto Spouse, along with two of her friends, attested that there was a degree of mutual commitment to a shared life between the parties, that the parties had represented publicly that they were in a close relationship, there was a strong degree of emotional support between the parties and that the relationship was more than one of mere convenience.

In the view of the Tribunal, the Trustee was required to make a value judgement, taking into account a wide range of factors. The Tribunal was satisfied that the Trustee exercised its value judgement in a way that was fair and reasonable in all the circumstances. It stated that other fair-minded people assessing the same evidence as that before the Trustee may have arrived at a different conclusion about the status of the relationship between the Deceased Member and the De facto Spouse. However, the task before the Tribunal was to assess whether the Trustee acted fairly and reasonably in all the circumstances, not whether the Tribunal would have reached the same or a different conclusion if it were required to assess the matter. The Tribunal was satisfied on the facts before it that it was open to the Trustee to determine that the Deceased Member and the De facto Spouse were in a de facto relationship at the time of death and it was fair and reasonable for it to do so.

The next issue the Tribunal considered was whether or not it was fair and reasonable for the Trustee to pay the death benefit to the Deceased Member's Spouse, the Youngest Daughter and the De facto Spouse in equal proportions.

In the Tribunal's view the purpose of superannuation is to provide income in retirement to a member and their dependants. In the event of a death before retirement, the Tribunal's approach is to consider what might have occurred had the member not died, and whether there was anyone who had an expectation of ongoing financial support or a right to look to the Deceased

Member for ongoing financial support had the Deceased Member not died.

The Tribunal noted that the Complainant and the Youngest Daughter were each receiving financial support from the Deceased Member and could have expected to continue to receive this had the Deceased Member not died. The Eldest Daughter and Second Daughter were not receiving any financial support. As such, the Complainant and the Youngest Daughter together with the De facto Spouse were each entitled to receive a proportion of the benefit.

The Tribunal, therefore, affirmed the Trustee's decision to pay the benefit to the Deceased Member's Spouse, the Youngest Daughter and the De facto Spouse in equal proportions.

#### **D12-13\090. Death benefit**

*The complaints related to the Trustee's decision to split the death benefit 70% to the De facto Spouse as the 'spouse' of the Deceased Member and 30% to the Deceased Member's Mother (the Mother) as a financial dependant. The De facto Spouse argued that the Mother was not financially dependent on the Deceased Member and the Mother contended that the De facto Spouse was not in a de facto relationship with the Deceased Member at the time of his death. On review of the evidence, the Tribunal determined that there was evidence of a de facto relationship but not of financial dependency by the Mother. The Tribunal set aside the Trustee's decision and determined to pay the whole benefit to the De facto Spouse.*

The Deceased Member and the De facto Spouse commenced a relationship in April or May 2008. They had a separation between September 2008 and December 2008. In the first week of December 2008, the Deceased Member moved into the De facto Spouse's unit. In early October 2009 the Deceased Member and the De facto Spouse moved interstate and commenced living in a property that the Deceased Member had purchased. In October 2009 the Deceased Member and the De facto Spouse went on a holiday overseas. The Deceased Member died while they were overseas.

The Trustee determined to pay 70% of the benefit to the De facto Spouse as the 'spouse' of the Deceased Member and 30% to Deceased Member's Mother, as a financial dependant. The Mother disputed that the Deceased Member and the De facto Spouse were in a de facto relationship or that she was financially dependent on him at the date of his death and the De facto Spouse disputed that the Mother was financially dependent on the Deceased Member. The De facto Spouse sought to have the entire benefit paid to her and the Mother sought to have the benefit split equally between herself and the De facto Spouse although she did not accept that she was in fact the de facto spouse of the Deceased Member.

The Tribunal carefully considered the information provided by all the parties in relation to the relationship between the Deceased Member and the De facto Spouse. It did not appear to be in dispute that the Deceased Member and the De facto Spouse were in a relationship at the time of the Deceased Member's death. Following a review of

the information, the Tribunal was of the view that the nature of the relationship at the time of the Deceased Member's death was a de facto relationship, for the following reasons:

- They were living together in the Deceased Member's house at the time of his death. This was not disputed by the Mother, and she advised that the De facto Spouse vacated the property in February 2010, over three months after the Deceased Member's death.
- A statutory declaration of the friend of the Deceased Member (provided by the Mother) stated that their relationship had re-commenced in late 2008 indicating that they were in a de facto relationship at the time of the Deceased Member's death.
- The photos, cards and other material provided by the De facto Spouse showed evidence of a close loving relationship.
- A statutory declaration provided by the real estate agent provided independent support of the relationship.
- The De facto Spouse was not working at the time of the Deceased Member's death and he was supporting her financially.

Given the Tribunal's view that the De facto Spouse and the Deceased Member were in a de facto relationship at the time of the Deceased Member's death, it was not necessary for the De facto Spouse to show financial dependency on the Deceased Member to meet the

definition of 'dependant' in the trust deed although there was evidence of financial dependency.

From the evidence, it appeared there was a financial relationship between the Deceased Member and the Mother. The Mother stated that the Deceased Member had borrowed over \$40,000 from her and at the time of his death had repaid \$5,500. The evidence also indicated that he paid \$55,270 to his parents for the period 31 March 2008 to 24 August 2009. It appeared that he owed them \$40,623. The De facto Spouse submitted that these payments were deposited by the Mother into an account owned by the Deceased Member as savings for the deposit on the property that he subsequently purchased. The De facto Spouse was also of the impression that the Deceased Member owned two units but it appeared from the evidence that these units were in fact owned by his parents.

The picture that emerged with respect to the financial relationship between the Mother and the Deceased Member was that of parents assisting their son to save by undertaking banking and saving on his behalf and providing financial support to him when he needed it. The Mother stated that the Deceased Member depended on her to handle all his financial affairs. The evidence indicated that the Mother had access to the Deceased Member's accounts and was withdrawing funds from his account – her listing linked to his statements. However, this appeared to be repayment of a loan rather than financial support from him and it appeared to be at the behest and decision of the Mother rather than an activity undertaken by the

Deceased Member. The withdrawals were made in the state in which the Mother lived, not the state in which the Deceased Member lived.

Loans were made by the Mother to the Deceased Member suggesting that there were times when he was financially dependent upon her and her husband rather than the other way around. The repayment of those loans did not, in the Tribunal's opinion, render the Mother financially dependent on the Deceased Member.

The Tribunal could not find evidence that the financial relationship between the Mother and the Deceased Member was different to the financial relationship between the Father and the Deceased Member, other than that the Mother appeared to conduct transactions on the Deceased Member's account on his behalf to assist him with his saving for the property he eventually purchased.

The Mother stated that the Deceased Member had cable television installed in their home when she became ill and that he paid for the contract until his death. In the Tribunal's view this gift was not sufficient to regard the Mother as being partially financially dependent on the Deceased Member.

The Mother stated the Deceased Member's estate had debts of \$250,000 in relation to the Deceased Member. However, the estate also had assets including the Deceased Member's property, which was purchased for \$318,500. The debt representing the mortgage would be attached to the property and could be repaid if the property was sold. The Mother and



Father were the administrators of the estate. From the evidence, the Tribunal was of the view that the Mother was not financially dependent on the Deceased Member. The Tribunal determined to set aside the Trustee's decision and substitute its own that the whole of the death benefit be paid to the De facto Spouse.

### **D12-13\096. Total and permanent disability**

*The Complainant complained that the Insurer's and the Trustee's application of the 'Activities of Daily Living' definition in the consideration of his total and permanent disability (TPD) claim was not fair and reasonable because while he was a casual employee, he was not made aware of the eligibility requirements for casual staff in the provision of TPD benefits. On review of the evidence, the Tribunal determined that the Complainant continued to work for 12 months after his cessation of employment with Employer 1. As the Complainant was still working with Employer 2 after he had exited the Fund, he could not be considered eligible for a TPD benefit by the Fund. The Tribunal, therefore, affirmed the Trustee's decision.*

The Insurer and the Trustee calculated that the Complainant worked on average 10 hours per week with Employer 1 and therefore assessed him in accordance with the Activities of Daily Living ('ADL') definition of TPD (*incapacity to such an extent as to render a member unlikely ever again to be able to perform any of two of the following activities unassisted: bathing, dressing, eating, toileting or 'transferring' in and out of a chair*). As

the Complainant stated in his TPD claim form that his current daily activities included reading, light maintenance around the house and spending time on the computer, the Insurer and the Trustee determined that he did not meet the ADL test and denied his claim.

While the Complainant did not dispute that he worked an average of 10 hours per week, he alleged that he was not made aware of the eligibility criteria for casual staff for the provision of TPD benefits and that this caused him 'hardship, expense and false expectations'. He contended that the Trustee and Insurer showed 'contempt for their casual customers by taking out insurance money knowing they would never have to pay out a claim'. He sought full payment of TPD plus compensation for delays and hardship caused.

The Trustee in its submission stated that the Complainant was sent a letter dated 27 February 2008 enclosing an information pack which included a copy of the relevant Product Disclosure Statement ('PDS') issued on 30 June 2007. The information in relation to the ADL definition of TPD for members working less than 15 hours per week was set out on page 27 of the PDS. The information pack also enclosed a 'Welcome Certificate'.

The Complainant initially indicated in his member application form that he did not wish to apply for insurance cover under the Fund. However, it appeared the plan's default insurance cover was automatically provided to him. The Welcome Certificate sent to the Complainant after joining the Fund

outlined his insurance cover. The Trustee stated that it did not receive any inquiries from the Complainant in relation to his insurance cover. The Complainant continued to pay premiums while he was a member of the Fund and proceeded with submitting a claim for TPD.

The Complainant argued that the Insurer gave him false hope by proceeding to assess his claim. However, the Insurer argued that there was nothing improper in it doing so, indeed that the conduct was consistent with its obligation to fairly assess the claim.

In its review of the complaint, it became apparent to the Tribunal from the evidence submitted that there was some doubt as to the date upon which the Complainant ceased all employment. It was not in dispute that the Complainant ceased working for Employer 1 no later than 16 March 2009 but possibly as early as 2 January 2009. However, upon inquiry by the Tribunal, the Complainant stated he had worked an additional 12 months after ceasing work with Employer 1 and was working with Employer 2 until 17 January 2010. From the evidence, at the time the Complainant ceased working for Employer 1 and was covered for insurance in the Fund, he was working more than 15 hours per week. The ADL definition of TPD, therefore, had no application. However, at the time the Complainant ceased working for Employer 1 he continued to work for Employer 2. As insurance cover with the Fund ceased when he exited the Fund on 2 April 2009, the Complainant could not be considered for a TPD benefit by the Fund as he was still working for

Employer 2. (The fund into which superannuation contributions in respect of his employment by Employer 2 were paid considered the Complainant to be TPD and paid him a TPD benefit based on him ceasing work on 17 January 2010.)

The Tribunal, therefore, considered the decisions of the Trustee and Insurer to reject the Complainant's claim for TPD fair and reasonable in the circumstances.

### **D12-13\099. Administration**

*The Complainant argued that the Trustee's failure to follow his instructions and process his benefit on the date he requested was not fair and reasonable and led to a loss for which he should be compensated. The Trustee argued its quick processing of his request was fair and reasonable in the circumstances and that members cannot choose the date on which their payments are processed. The Tribunal agreed with the Trustee and affirmed its decision.*

The decision under review was that of the Trustee refusing to compensate the Complainant for the difference between the value of his benefit on 25 May 2010, when a partial withdrawal of his benefit was processed, and the value it would have been had the withdrawal been processed on 4 June 2010, which was the date he requested that it be processed.

The Complainant applied in early May 2010 to withdraw \$440,000 from his superannuation account with the Fund, stating in his correspondence that he required the funds by the end of May 2010. His intention was to leave

sufficient funds in the account to enable him to claim a tax deduction for a contribution of \$45,000. His initial correspondence emphasised that he wished his claim to be expedited for the purchase of a new house. However, the Fund contacted the Complainant by telephone on 24 May 2010 and advised him that if he withdrew \$440,000, there would be insufficient funds in his account to enable him to claim the tax deduction. The Complainant then agreed to reduce the withdrawal to \$370,000 emphasising in that letter that he wished the matter to be finalised on 4 June 2010.

The Complainant stated that the reason for the change in date from the end of May 2010 to 4 June 2010 was:

Because I had in the meantime lost a considerable amount of money through the steep fall of the unit price and I was hoping that I would be able to re-coup a small amount of this loss with even a minor upturn of the market (as was expected and indeed occurred.)

The Fund processed the withdrawal on 25 May 2010, using unit prices applicable at 24 May 2010. On 14 July 2010 the Complainant lodged a complaint with the Tribunal that the decision of the Trustee to calculate his benefit at 25 May 2010 and not at 4 June 2010 as he had requested was unfair or unreasonable. The resolution initially sought by the Complainant was compensation of \$3,275, being the difference between the value of his account on 25 May 2010 and the value on 4 June 2010. He later amended his claim to \$2,710.50. He calculated his

loss as the difference between the value of his account after withdrawal on 25 May 2010 - \$77,666.66, and the value his account would have been had the withdrawal occurred on 4 June 2010 - \$80,376.16, a difference of \$2,710.50.

In his submission to the Tribunal, the Complainant stated that his case was a simple one – the Fund did not carry out the instructions he gave them when it withdrew his funds earlier than he had requested.

In its correspondence to the Complainant of 21 June 2010, the Fund reviewed the history of the complaint and stated:

Members' requests for benefit payments are processed using the latest available unit price on the morning of the day we process your benefit. As you had supplied all of the required information on the 26 May 2010, your partial payment of \$370,000.00 was processed on this date using the unit prices for effective date 24 May 2010. Generally, members can not choose a date they wish their benefit payment to be processed as all benefit payments are completed in accordance with the fund rules.

The Tribunal carefully considered the circumstances of the complaint. In the Tribunal's opinion, it was reasonable for the Trustee to have formed the view that, given earlier correspondence, the Complainant required the funds as soon as possible and that he would prefer to receive his funds at the earliest opportunity. Further, while hindsight showed that the Complainant's account

balance was higher on 4 June 2010 than it was on 25 May 2010, the difference (loss) suffered by the Complainant related to the movement in unit prices not to any unfairness or unreasonableness in the conduct of the Fund. Had the value of the Complainant's benefit been less on 4 June 2010 than on 25 May 2010, the complaint would not have arisen. Moreover, there was no evidence that the Complainant was advised that he could select the date on which his benefit would be calculated and paid. In any event, the method of calculation of benefits would mean that a member of the Fund would not be able to calculate the exact value of their benefit because the unit price would not have been struck at the time of application for the benefit. The Tribunal, therefore, found the Trustee's decision to reject the Complainant's claim for the difference in value of his benefit, fair and reasonable in the circumstances.

### **D12-13\107. Total and permanent disability**

*The Complainant argued that the Trustee's and Insurer's application of the mandatory 14 day waiting period for income protection benefits was too stringent in his circumstances. He argued that he left work early due to back pain but was unable to visit a doctor until the following day and, therefore, while he was only medically certified as disabled for 13 days, he was disabled for the required 14 days. The Trustee and Insurer argued that the trust deed was clear and that for a member to qualify for an income protection benefit he must be medically certified for 14 days, which the*

*Complainant was not. The Tribunal agreed and affirmed the Trustee's and Insurer's decisions.*

The Trustee determined that the Complainant was not eligible for an income protection benefit because he was not disabled for at least 14 out of the first 19 consecutive days of the waiting period. It said that in order for the Complainant to be eligible for a benefit, he must be totally disabled before the waiting period commences and the waiting period commenced on the day a medical practitioner examined him and certified him to be disabled.

The Trustee said that the date that the Complainant was examined by a medical practitioner and certified as disabled was 22 April 2009 with the consequence that the waiting period commenced on that date. It then said that the Complainant was certified fit to return to suitable duties from 5 May 2009 and there was, therefore, a period of 13 days from 22 April 2009 to 5 May 2009 for which he was certified as being unfit for work.

The Complainant, however, argued that he had been totally disabled for the 14 consecutive days required under the policy. He had said he left work around 2pm on 21 April 2009 due to severe lower back pain related to the injury and that he found it impossible, due to the pain levels, to seek medical help after arriving home and sought relief by resting in bed and taking painkillers for that day only. He went to see his general practitioner the next day. He argued that it was unreasonable that the obligatory period of 14 consecutive days should be applied so stringently, given that he was

genuinely disabled for at least 14 days and prior to it.

The Insurer submitted that the terms of the policy were clear and that the Complainant must have been totally disabled for 14 of the first 19 days of the waiting period and that that waiting period started on the date a medical practitioner examined Complainant and certified that he was disabled. The Insurer said that, following a review of all the available evidence, it was of the opinion that the Complainant had returned to work and appeared to work reduced hours within the waiting period. The Complainant, therefore, had not fulfilled the terms of the policy.

There was medical evidence before the Tribunal that the Complainant was suffering from an injured back well before he left work on 21 April 2009 but that medical evidence did not certify that he was unfit for work and the effect of the evidence was that he continued to work until 21 April 2009. The Complainant returned to work on 5 May 2009, working a reduced number of hours but, nevertheless, a substantial number of hours.

The expression 'waiting period' is defined in the policy as meaning the continuous period for which an insured member has to be disabled before a disability benefit becomes payable, subject to the following requirements:

- (a) The waiting period starts on the date a *medical practitioner* examines the *insured member* and certifies that he or she is *disabled*;

- (b) The insured member must be totally disabled for at least 14 out of the first 19 consecutive days of the waiting period to qualify for a disability benefit.

The Trustee and the Insurer were required to determine whether the Complainant satisfied the waiting period test in the policy and their joint view was that he was not absent from work for 14 days from the date on which a medical practitioner examined and certified him as being unfit for work. The Tribunal agreed with that view.

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