Superannuation Complaints Tribunal

Quarterly Bulletin

Issue No. 75

1 Jan – 31 Mar 2014

Chairperson's report

Update on the special complaints resolution project

In the June 2013 Quarterly Bulletin, I advised that the Tribunal was to receive additional Federal Government funding from the 2013 budget (recouped through the APRA levy) to deal with approximately 550 complaints identified as the Tribunal's 'backlog'. The funding is for a 2 year period and finishes on 30 June 2015. A dedicated Project Team of staff new to the Tribunal was established on 1 July 2013 to work on these complaints.

I am pleased to report that of the 550 complaints, 146 have been finalised, 195 are currently under investigation and are at various stages of the Tribunal process, with the remaining waiting to be allocated to a complaints analyst within the Project Team in the near future.

Statistics

The workload of the Tribunal trended upward during the quarter with an increase of 3.5% in the number of telephone calls received and an increase of 5.7% in the number of complaints received compared to the last quarter.

The Tribunal's outputs continue to improve as a result of the efficiencies achieved through the recent process re-engineering project. 692 complaints were finalised in the quarter, an increase of 5.3% compared to the previous quarter.

The high number of conciliation conferences being conducted continued, and the settlement rate improved from the previous quarter to 52.6%.

The Tribunal also determined 67 cases at review this quarter, bringing the total number of complaints determined at review for the nine months to 31 March 2014 to 168, compared to 83 for the same nine month period last year.

Six determinations of interest are summarised in this bulletin.

We are moving

On 4 July 2014, the Tribunal will be moving to Level 7, 120 Collins Street, Melbourne. Our postal address and telephone and facsimile numbers will remain unchanged.

Jocelyn Furlan

Chairperson

Statistical overview

Quarterly statistics – Jan to Mar 2014

Telephone inquiries

The Tribunal received 2,997 telephone calls this quarter (last quarter – 2,895), which is an increase of 3.5% compared with the previous quarter.

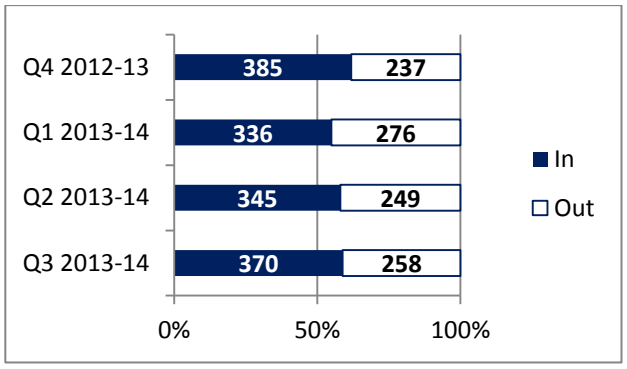
The Tribunal dealt with a wide range of inquiries, the most popular were queries about the Tribunal itself (76%), followed by complaint related inquiries (18.8%).

Written complaints

This quarter, the Tribunal received 628 written complaints (last quarter - 594), which is an increase of 5.7% compared with the previous quarter.

Jurisdiction

Of the 628 written complaints received this quarter, 370 (58.9%) complaints were within jurisdiction (previous quarter – 58.1%). Of the 258 (41.1%) complaints closed as outside jurisdiction, 173 (67%) 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 65.8%).

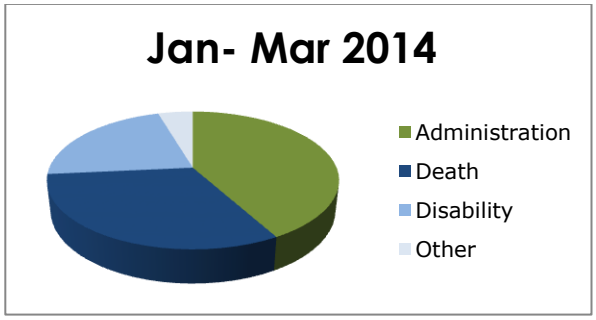


Complaints within jurisdiction

Nature of written complaints within jurisdiction

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

Administration complaints comprised the largest category of all written complaints received within jurisdiction – 41.9% (last quarter – 40.9%). Death benefit complaints made up the second-largest category at 31.6% (last quarter – 32.2%), followed by disability at 21.9% (last quarter – 21.4%). Other complaints made up 4.6% (last quarter – 5.5%).



Nature of written complaints within jurisdiction

Performance

Complaints finalised

The Tribunal finalised 692 written complaints this quarter, an increase of 5.3% compared to the previous quarter.

Of the 692 finalised complaints, 9.7% were finalised at review (last quarter 7.9%), 51.7% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 48.1%) and 38.6% were outside jurisdiction (last quarter 44%).

Conciliation conferences

The Tribunal conciliated 208 cases in the quarter, an increase of 1% on last quarter's 206.

Of the 169 cases concluded, settlement was achieved in 89, resulting in a settlement rate of 52.6% (last quarter – 49%). 39 cases (18.7%) were adjourned in the quarter (last quarter – 55).

Nature of conciliation cases

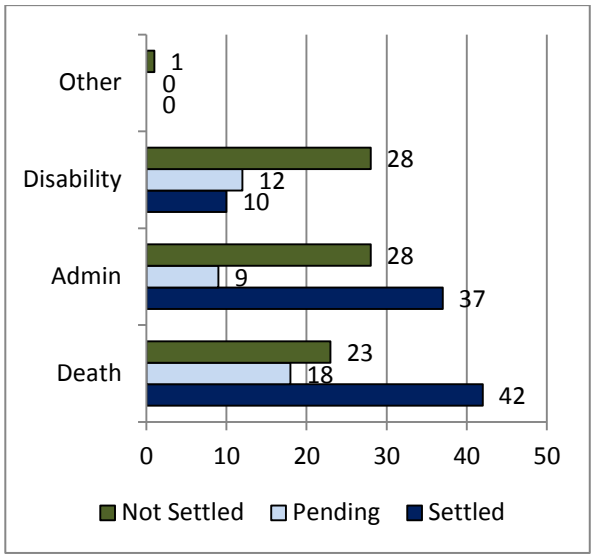
The categories of note in the quarter are as follows:

Death benefits – Of the 65 concluded cases, 42 (64.6%) were settled.

Administration – Of the 65 concluded cases, 37 (57%) were settled.

Disability – Of the 38 concluded cases, 10 (26.3%) were settled.

Other – 1 concluded case was not settled.



Settlement by conciliation

Review determination outcomes for the quarter

The Tribunal determined 67 cases this quarter (last quarter – 52 cases).

The largest category of complaints determined at review was administration complaints: 25 (37.4%)

Admin	Qtr	YTD
Affirmed	23	64
Remitted	0	2
Varied	0	0
Set aside	2	12
Total	25	78

Death Benefit complaints made up the second largest category: 21 (31.3%)

Death	Qtr	YTD
Affirmed	19	48
Remitted	0	0
Varied	0	1
Set aside	2	9
Total	21	58

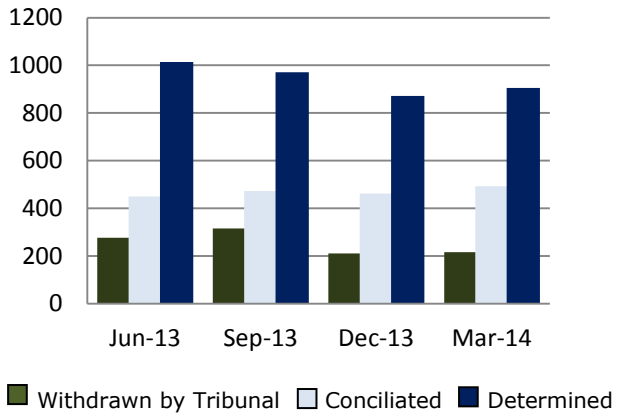
Followed by disability complaints: 21 (31.3%)

Disability	Qtr	YTD
Affirmed	15	32
Remitted	1	2
Varied	0	1
Set aside	5	10
Total	21	45

85.1% of trustee decisions were affirmed during the quarter, compared with 78.8% last quarter.

Efficiency

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



Recent determinations of interest

D13-14\109. Administration

The Complainant lodged a complaint with the Tribunal that the decision of the Trustee to amend the Fund's trust deed to remove the 4% p.a. minimum earning rate on certain accumulation accounts invested in the Fund's Growth investment option was unfair or unreasonable because It removed previously awarded benefits that prospectively may have had considerable value. The Tribunal found that although this amendment negatively affected a small group of members, it was satisfied that it was fair and reasonable for the Trustee to accede to the Employer's request to remove the 4% p.a. minimum interest rate, as it was in the best interests of the membership as a whole. The Tribunal therefore affirmed the decision of the Trustee.

On 11 June 2010 the Complainant lodged a complaint with the Tribunal regarding the decision of the Trustee to amend the Fund's trust deed to remove the 4% p.a. minimum earning rate on certain accumulation accounts invested in the Fund's Growth investment option. The Complainant was a former employee of the Employer and a current deferred benefit member of the Fund. He had a portion of his benefits in an accumulation account which is invested in the Growth investment option. Up until 30 June 2010, this option attracted a minimum 4% p.a. crediting rate as long as it remained invested in the Growth option.

On 29 December 2009, the Complainant received a letter from the Trustee advising that the Trustee had agreed with a request from the Employer to discontinue the minimum interest rate. This change was to be effective from 1 July 2010.

The Complainant submitted that the removal of the minimum interest rate was unfair and unreasonable because it was not a decision made in the best interests of the affected beneficiaries as is required by the Trustee under superannuation law. He further submitted that the actuarial certificate completed by the Fund actuary certifying that the removal of the minimum interest rate complied with the requirements of Clause 32(3)(a)(i) of the Trust Deed was erroneous and should have been discarded by the Trustee.

The Tribunal considered the nature of defined benefit funds. In these funds benefits are determined by formulae and funded by member contributions at a specified rate and employer contributions at a rate required to fund the remainder of the benefit. Members could also make employee voluntary contributions, have salary sacrifice contributions made on their behalf, transfer in other benefits all of which would generally form an accumulation account earning interest which is added to the defined benefit to determine a member's final benefit.

The Complainant left employment in 1997 and retained his defined benefit in the Fund as an accumulation account earning interest. His entire benefit was invested in the Growth Option and benefitted from the minimum interest rate.

The Tribunal noted the Trustee's submission that the prospective benefits removed were not attributable to mandated employer contributions. It further noted that the Employer had advised the Trustee that it would no longer support the 4% p.a. minimum interest rate as the application and cost had grown to be substantially more than had been originally envisaged.

Some of the reasons for this growth were due to changes in legislation, for example, changes allowing members to remain in superannuation funds for longer periods. This meant that the minimum interest rate applied to much larger benefits and for longer periods than anticipated.

The Trustee had advised that the 4% p.a. minimum interest rate was originally only applied to member contributions on resignation. Changes that allowed members to leave their retirement benefits in the Fund as an accumulation benefit which attracted the minimum rate in its entirety were not originally envisaged.

The Tribunal considered that employers who fund benefits above the minimum required by legislation have to be afforded the ability to react to economic situations and other factors that may impact on their ability or desire to continue to fund increased prospective benefits.

The Tribunal noted that the SIS Act allows trustees of superannuation funds to adapt to legislative changes and employer requests for change as long as it is permitted under the fund's trust deed, does not reduce the accrued benefits of any fund members and is in the best interests of fund beneficiaries.

The Tribunal was satisfied that it was fair and reasonable of the Trustee to consider the Employer's request to remove the 4% p.a. minimum interest rate.

The Tribunal considered the clauses of the Trust Deed relevant to the power to make amendments to the Trust Deed. The Tribunal was satisfied that the wording of Clause 32 was not changed by the amendment dated 17 December 2009. Under Clause 32(2), any part of the deed may be amended by the Employer with the consent of the Trustee. Under Clause 32(3)(a)(i), the Trustee was required to obtain certification from the Fund actuary that any amendment did not reduce the accrued benefits of members or substantially prejudice any rights secured by contributions paid prior to the execution date.

The Complainant submitted that the Trustee did not obtain the necessary certification from the Fund actuary prior to its decision to amend the Trust Deed to remove the minimum interest rate. While the Tribunal agreed with the Complainant on this point, it was satisfied that the Fund actuary must have been consulted about the situation in order to produce the actuarial certificate on 2 December 2009. Although the decision of the Trustee to amend the Trust Deed was made on 1 December 2009, the amendment was not executed until 17 December 2009 by which time the actuarial certificate had been signed.

The Complainant further submitted that the actuarial certificate was erroneous as it was obvious that the accrued benefits of affected members could prospectively reduce if the Growth option earned a rate less than 4% p.a. He argued that his rights were also prejudiced by the removal of the minimum interest rate.

The Tribunal noted that the Fund actuary had been appointed in accordance with the Trust Deed. The Tribunal was therefore satisfied that it was fair and reasonable of the Trustee to rely on the Fund actuary's certification that the amendment complied with the relevant requirements.

The Tribunal noted that it was incumbent upon the Trustee to ensure that the amendment to remove the 4% p.a. minimum interest rate was in the best interests of Fund beneficiaries.

Given that the Trustee had been given advice by the Employer that it was no longer going to support the minimum interest rate in the Fund, the Trustee determined that it needed to remove the benefit prospectively otherwise the provision of the benefit for a particular small group of members would affect the membership as a whole. The Tribunal noted that the Trustee provided affected members, including the Complainant, with six months' notice of the proposed amendment to allow time for those affected members to consider their future options.

The Tribunal was satisfied that it was fair and reasonable for the Trustee to accede to the Employer's request to remove the 4% p.a. minimum interest rate which applied to certain Fund members and therefore affirmed the decision of the Trustee.

D13-14\112. Administration

The Complainant argued that the decision of the Trustee to reject the Complainant's claim for reinstatement of his salary continuance insurance (SCI) cover was not fair and reasonable in the circumstances. He argued that it is the responsibility of the Trustee to notify members when insurance coverage is at risk of lapsing. The Complainant also argued that sufficient funds were available to cover the premiums at the time that his SCI cover lapsed. The Tribunal was satisfied that the Complainant was aware that he needed to maintain sufficient funds in his account to pay premiums and showed evidence of trying to make these payments. The Tribunal therefore found it fair and reasonable for the Trustee to refuse to reinstate the Complainant's SCI cover.

On 21 October 2011 the Complainant lodged a complaint with the Tribunal that the decision of the Trustee to refuse to reinstate his SCI cover was unfair or unreasonable, and argued that sufficient funds were available to cover the insurance and that there is a responsibility by the Trustee to notify members of that the insurance coverage is at risk of lapsing. The resolution sought by the Complainant was reinstatement of his insurance cover.

The Complainant's account had insufficient funds to pay premiums from 1 March 2005 to 1 July 2005. His then Fund wrote to him on 8 June 2005 and advised him that his account had insufficient funds and that the annual premiums were $377.30. The Complainant paid a contribution of $250 on 15 June 2005. His account balance at 30 June 2005 including this contribution was $250.32. His outstanding premiums of $135.37 were deducted from this amount on 1 July 2005 which left a balance of $114.95. He then again had insufficient premiums to pay for the premiums for July to September 2005 and his SCI lapsed on 20 July 2005.

The Trustee submitted that its PDS contained the relevant disclosure in relation to the cessation of insurance and the requirement to have sufficient funds to cover the cost of premiums. However, the PDS referred to by the Trustee was dated 1 November 2007, which was not the relevant PDS.

The Fund's PDS dated 30 April 2004 stated that 'if there are insufficient funds in your account to pay premiums, cover may cease.' Under 'When will cover cease?' it is stated '28 days after the date we write to you advising that you have insufficient funds in your account to meet the required insurance premium.'

The Complainant stated that he did not receive the Fund's letter of 8 June 2005. However, he made a contribution of $250 on 15 June 2005. The Tribunal was satisfied that the Complainant was aware that he needed to maintain sufficient funds in his account to pay premiums (he acknowledged this in his complaint). He stated that he made a further contribution of $200 in August 2005.

The Tribunal was satisfied from these payments that the Complainant understood the necessity of having sufficient funds in his account to cover the cost of premiums.

The Complainant's 2006 and later annual statements do not show any SCI cover but it appears that the Complainant did not raise the issue until he contacted the Fund on 18 August 2011.

In the Tribunal's view, the decision of the Trustee to refuse to reinstate the Complainant's SCI cover operated fairly and reasonably in the circumstances as the Complainant had insufficient funds in his account to cover the SCI insurance premiums.

In the Tribunal's view, it was fair and reasonable for the Fund to cancel the SCI insurance before cancelling the death and TPD cover because the SCI cover was more costly.

Although the Complainant claimed he did not receive the 8 June 2005 letter, he paid $250.00 contributions on 15 June 2005. The 8 June 2005 letter stated that his annual premiums were $377.30. The Complainant made a further contribution on 15 August 2005 of $200.

The Complainant's 2006 benefit statement showed no SCI cover, but the Complainant did not appear to have followed this up with the Former Fund any time prior to August 2011.

The Tribunal therefore determined that the decision of the Trustee to reject the Complainant's claim for reinstatement of his SCI cover was fair and reasonable in its operation in relation to the Complainant in the circumstances.

D13-14\121. Administration

The Complainant lodged a complaint that the decision of the Trustee to refuse to compensate him for loss suffered by him as a result of incorrect information provided to him about his eligibility to claim his superannuation benefit was not fair and reasonable. The complainant argued that he had been misled by the wording in the Fund's guide ('the Guide') and had suffered a financial loss of approximately $32,000. The complainant also argued that, had he been given correct information regarding his entitlement to his pension, he would have claimed the pension on 10 November 2010. The Trustee acknowledged that the benefit statements provided to the Complainant for the years ended 30 June 2009 and 2010 were incorrect and that the Complainant could actually have claimed his benefit from age 55. The Tribunal therefore determined to set aside the decision and substitute its own decision that the Complainant's claim for compensation be accepted.

On 23 September 2011 the Complainant lodged a complaint with the Tribunal regarding the decision of the Trustee to reject his claim for compensation. The complainant sought compensation as a result of being misled by wording in the Guide and claimed he had suffered a financial loss of approximately $32,000, as a result of not claiming the pension he was entitled to. The resolution sought by the Complainant was compensation for the pension he was eligible to claim, but did not claim, from November 2010.

After the Tribunal's review of the relevant section of the Guide, it was found that the confusion had arisen because the preservation requirements set out in the Guide did not accurately reflect the SIS Regulations and that the Complainant understood the phrase 'change employers' to mean that he had to be re-employed by another employer after he was made redundant for him to be eligible to claim his benefit. He had not permanently retired from the workforce and none of the other conditions applied to him.

On the basis that he thought that 'change of employer' meant that he needed to be re-employed by another employer to be eligible to claim his benefit, the Complainant did not contact the Fund after his employment was terminated. It was only as a result of a conversation with a friend that he established that he might be eligible to receive his benefit.

The Tribunal was satisfied that it was reasonable for the Complainant to ascribe the meaning that he did to the words in the Guide. On their face they indicated that a person must change employers rather than merely cease employment after age 60.

The next issue considered by the Tribunal was whether the Complainant should have either looked at other documentation about his superannuation or contacted the Fund's administrator when his employment was terminated to confirm his eligibility to receive his benefit.

In the Tribunal's view, it was understandable that the Complainant did not enquire about his superannuation. The wording of the second condition 'change employers' in the Guide, which he received with his 2010 benefit statement, which would have been received at around the time his employment was terminated, was capable of having the meaning ascribed to it by him and was not so sufficiently overtly unclear that the Complainant ought to have referred to the Fact Sheet mentioned in the Guide or contact the Fund.

The Tribunal was also of the view that it was the Trustee's obligation to provide enough clear information for members to be able to understand their investment in the Fund. A member should not be expected to have to cross-check different pieces of information to identify inconsistencies.

The Trustee acknowledged that the benefit statements provided to the Complainant for the years ended 30 June 2009 and 2010 were incorrect and that the Complainant could actually have claimed his benefit from age 55 on termination of employment. The Tribunal was of the view that a trustee, acting fairly and reasonably, would have compensated the Complainant in the circumstances of this complaint because the Complainant's interpretation of the wording 'change employers' in the Guide was a reasonable interpretation. In addition, the Tribunal accepted the submission of the Complainant that it was not reasonable to expect that members cross-check different documents to ascertain any inconsistencies.

The Tribunal also accepted the Complainant's statement that he only read the Fact Sheet after he became aware that he might be eligible to claim his benefit. The Complainant's 2009 and 2010 benefit statements were incorrect in that they showed the Complainant's benefits as preserved even though he was over 55 at the time.

The Tribunal acknowledged that the Complainant was also in possession of correct information about accessing his benefit, but this information referred to SIS upper limits and lump sum benefits which the Complainant would not have regarded as relevant to his situation as he intended to claim his benefit as a pension.

Having determined that a trustee, acting fairly and reasonably, would have compensated the Complainant in the circumstances of this complaint, the Tribunal determined to set aside the decision of the Trustee, and determined that compensation was payable.

The Trustee submitted that if the Tribunal found unfairness and unreasonableness, the matter should be remitted to it to calculate any compensation payable. However, in the interests of finalising the complaint, the Tribunal determined to calculate the amount of compensation payable itself.

The Trustee submitted that its governing rules do not permit the Complainant's pension to be backdated to commence on 10 November 2010. The Tribunal accepted this submission.

Any compensation that was payable to the Complainant, given the circumstances (including that the Complainant had taken his benefit as a pension), must be an approximation of the detriment suffered by the Complainant by him not claiming his pension at the time his employment ceased.

The Tribunal noted that the Parties agreed that the amount of pension payable for the period was $32,022. The Tribunal also noted that the annual pension would have been $530.49 per annum less had it commenced on 10 November 2010. The Trustee, using life expectancy tables, calculated that the additional pension the Complainant would receive over his actuarial lifetime would be $7,737.72, making the maximum potential value of any lost opportunity $24,284.28 gross.

The tax deducted from the Complainant's pension was $245 per fortnight. The total tax for the period from 11 November 2010 to 14 June 2011 was approximately $3,675.

Accordingly, the Tribunal determined, using the information available, that $20,609 would represent fair and reasonable compensation.

D13-14\126. Total and Permanent Disability

The Complainant lodged a complaint with the Tribunal that the decision of the Trustee and Insurer to decline to pay him an additional 2 units of TPD cover, after accepting his TPD claim and paying him 2 units of cover, was unfair and unreasonable. The Trustee submitted that the Complainant did not satisfy the eligibility conditions and therefore was not eligible for the extra units of cover. The Complainant argued that he was in fact eligible and the Tribunal established the same, setting aside the decision of the Trustee and the Insurer.

On 8 November 2011 the Complainant lodged a complaint with the Tribunal disputing the amount of insurance paid to him after his claim for TPD was accepted.

There was no dispute between the Parties that the Complainant satisfied the requirements for a TPD benefit. His claim for a TPD benefit was accepted by the Insurer and the Trustee and he was paid an insurance amount representing 2 units of cover in October 2010.

The complaint concerned the amount of insurance paid. On 27 November 2006, the Trustee increased the default level of cover it provided to members of the Fund. From this date the Complainant's premiums doubled and his cover was increased from 2 units to 4 units.

The Tribunal noted that the letter from the Trustee advising of the new insurance arrangements included the definition of Active Employment and notified members that if they did not satisfy this definition as at 27 November 2006, the new cover would not be effective until they did.

The issue before the Tribunal was whether or not the Complainant satisfied the definition of Active Employment on 27 November 2006.

The Complainant suffered a severe crush injury to his left forearm on 21 January 2005. As a result of this injury he spent approximately six months off work before commencing a return to work plan. The Complainant was retrenched from the Employer on 6 February 2009.

The Tribunal considered the definition of Active Employment in the Policy. It noted that the Complainant had to be gainfully employed and attending work on 27 November 2006. The compliance of the Complainant with this aspect of the definition is not in dispute between the Parties. The Complainant was employed by the Employer on that date and attended work.

The definition of Active Employment also required that the Complainant be performing his normal duties without restriction due to injury. The Tribunal considered that for the purposes of determining whether the Complainant was eligible for the increased cover, the Complainant only had to satisfy this requirement on 27 November 2006, not before or after.

The Tribunal noted that the Complainant was a site foreman prior to his injury. The Employer provided a description of his duties prior to the injury. It appeared to the Tribunal that the duties could vary on a daily basis and also vary between worksites and the particular requirements of each contract. Therefore the Tribunal considered that the Complainant's 'normal duties' could consist of a range of activities on any given day.

The Tribunal noted that there had been numerous reports prepared for Workers Compensation purposes documenting the progress of the Complainant throughout his return to work following his injury. The Tribunal further noted that there was a Closure Report dated 18 October 2006 prepared due to the "stable physical capacity, return to work duties and hours and in the absence of further practical recommendations to be made in relation to the return to work."

It was acknowledged in the Closure Report that the Complainant had had difficulties coping at various times with the return to work program. However the Report also referred to a successful return to work, noted that the Complainant had progressed to fulltime hours in early July 2006 and reported improved hand and thumb function over time requiring no further surgery.

The Insurer stated that if the Complainant had been fit for normal duties then a final medical certificate would have been obtained from Workers Compensation. However the Tribunal did not consider it fair and reasonable for the Insurer to rely heavily on the production of such a certificate given the comments in the Closure Report and the fact that the Complainant's Workers Compensation file was closed.

The Tribunal noted that the Complainant's payslip for the week ending 29 November 2006 showed that he had worked 36 hours in that week. It was acknowledged by all Parties that the Complainant would take time off work for specialist appointments. The Tribunal was of the opinion that it was open to the Trustee and the Insurer to determine that any such time off work would not of itself constitute a restriction due to injury to the Complainant performing normal duties and it would have been fair and reasonable for them to do so.

The Tribunal considered a letter from the Employer to the Trustee dated 25 June 2012. In response to questions from the Trustee it stated, "When [the Complainant] was available to return to work, he resumed his role as site manager… During these stages, [the Complainant] was still performing his normal duties… The only restriction was his attendance due to rehabilitation and medical appointments as necessary".

As stated above the Tribunal was of the opinion that it would be fair and reasonable for the Trustee and the Insurer to consider that time off work to attend appointments did not necessarily mean that the Complainant was unable to perform his normal duties without restriction due to injury.

The Tribunal noted that the 25 June 2012 letter enclosed a Workers Compensation Return to Work Plan dated 25 September 2006. It noted certain restrictions for the Complainant up to 22 October 2006 but no indication as to whether the restrictions impacted his normal duties.

The issue at hand was whether the Complainant was performing his normal duties without restriction due to injury on 27 November 2006.

The Tribunal considered that from the Complainant's payslip for the relevant week it could be assumed that he worked a full day on 27 November 2006 and that had not been disputed by the Parties.

The Complainant outlined the role he was performing on the relevant day and the Tribunal was satisfied that the duties as described were duties that would have been performed by him pre-injury. The Insurer and the Trustee had stated that there was nothing to support the Complainant's claims about the duties he performed on 27 November 2006.

The Trustee submitted a list of the documents on which it based its opinion that the Complainant did not satisfy the Active Employment definition. The Tribunal considered this list and noted that the reports prepared for Workers Compensation purposes all pre-dated 27 November 2006 and there was no evidence that the restrictions advised impacted on the Complainant performing his normal duties on that day. The

Tribunal further considered that a statement from the Complainant saying that he broke down from the work pressure in late 2006, on the balance of probabilities, supported his position that he was performing normal duties at the relevant time.

The Tribunal considered that the only evidence that the Complainant was likely to be able to produce relevant to the day in question was a statement from the Employer. The Tribunal noted that the Employer supplied such a statement dated 25 June 2012.

The Employer stated that the Complainant was performing his normal duties as a site manager at the relevant time and the Tribunal could see no reason to dispute this statement. The Insurer had requested that the CEO of the Employer sign the statement. This did not occur and the Tribunal considered that it was not fair and reasonable for the Insurer to discount the statement due to this fact.

It did not appear to the Tribunal that there was any evidence supporting a contrary opinion as at 27 November 2006 and it would have been fair and reasonable of the Trustee and the Insurer to conclude that the Complainant was not restricted by injury from performing his normal duties on that day given that 'normal duties' could encompass a large range of tasks.

The Tribunal therefore set aside the decision, and substituted its own decision that the Insurer pay the insured amount of additional 2 units of Total and Permanent Disability ('TPD') cover to the Trustee together with interest calculated for the period.

D13-14\142. Administration

The Complainant lodged a complaint with the Tribunal that the decision of the Trustee refusing to lodge an amended member contributions statement (statement) with the ATO, was unfair and unreasonable. The Trustee argued that it did not receive advice that the Complainant's relevant contributions should have been treated as 'personal' prior to the closure of his account and that at the appropriate time, it had not received a valid nomination. Accordingly, it was prevented by ITAA s.290-170(1)(b) from issuing the acknowledgement the Complainant sought. The Tribunal determined that the Trustee's refusal was not fair and reasonable, and set aside the decision, directing the Trustee to lodge an amended member contributions statement with the ATO.

In April 2008, the Complainant had contributed $88,000 to his member account in the Fund, which he intended as a "personal concessional deductible taxable" contribution. The Trustee issued an 'Additional Investment Confirmation statement' ('the Fund confirmation') which showed that the $88,000 contribution had been treated as an employer contribution.

In the Complainant's tax return lodged for the financial year ending 30 June 2008, in the relevant section for 'Total Supplement Deductions', the Complainant claimed a 'Personal superannuation contribution' of $88,000. The tax return identified that this payment had been made by the Complainant into his member account with the Fund.

In May 2009, the ATO notified the Complainant that he may have to pay excess contributions tax. This letter asserted the Complainant had made 'concessional contributions' of $177,324.77 as against a cap of $100,000 producing an 'excess concessional contribution' of $77,324.77. This was based on the ATO's view that two deductible contributions of $88,000 each had been made by the Complainant or on his behalf.

By letter dated 8 June 2009, the Trustee notified the Complainant that his concessional contribution for the 2008 financial year did not exceed the cap. The Trustee explained that it had identified a reporting error and was

working with the ATO to re-report by 10 June 2009.

On 11 November 2010, the ATO assessed the Complainant as having exceeded the concessional contributions cap for the 2008 financial year.

The Complainant lodged an appeal on 23 November 2010 with the ATO; it subsequently advised him on 18 February 2011 that it had disallowed his appeal; relevantly it also stated, "you should discuss the details of your contributions with your fund. If the details prove to be incorrect, your fund must lodge a member contributions statement to amend the reported details."

The Complainant then complained to the Trustee that it had failed to correct the contribution information previously forwarded to the ATO as promised in its letter to him dated 8 June 2009. The Complainant asserted that, based on the advice contained in that letter, he had claimed $88,000 as a personal contribution deduction, but, because the "correct" information was not conveyed to the ATO as promised, he had been issued with an excess contribution tax assessment.

In response, the Trustee explained that it did not receive advice that the Complainant's relevant contributions should have been treated as 'personal' prior to the closure of his account. At the appropriate time, it had not received a valid nomination for the purposes of ITAA s.290-170(1)(a), nor had it then sent the Complainant a notice of acknowledgement for the purposes of ITAA s.290-170(1)(c); accordingly, it was now prevented by ITAA s.290-170(1)(b) from issuing the acknowledgement the Complainant sought.

The Complainant requested the Trustee to issue an ITAA s.290-170(1)(c) notice showing that only one personal contribution payment of $88,000 had been received by it in the relevant year; in the event the Trustee was precluded by law from such remedial action, the Complainant claimed that the Trustee should pay the tax (plus interest and penalties (if any)) as acknowledgement that the Trustee's inaction at the relevant time, in not correcting the record with the ATO, had resulted in the tax being levied.

In the Tribunal's deliberations it noted that, at the outset, the Parties were in broad agreement as to the circumstances, leading up to the lodgment of the Complainant's 2007-2008 tax return with the ATO on 26 August 2008, in respect of the misallocation of his relevant superannuation contribution; it was this misallocation, described by the Complainant as personal and the Trustee as employer, that caused the ATO to conclude that two separate contributions of $88,000 had been made and that, as a consequence, the Complainant had made excess concessional contributions of $77,324.77.

This apparent duplication of the superannuation contribution was solely responsible for the excess concessional contributions tax of $24,357.30. The Trustee's letter of 14 December 2011, for use by the Complainant in his renewed effort to overturn the ATO's disallowance of his objection to the excess concessional contributions tax, was indicative of the Parties' agreement as to the circumstances.

However the Tribunal noted that the Trustee was firmly of the view that its 14 December 2011 letter represented the limit of its capacity to assist the Complainant; specifically, that due to the operation of ITAA s.290-170(1)(b), it was now precluded from issuing an ITAA s290-170(1)(c) acknowledgement to him, or altering the contribution type from employer to personal.

In this regard, the Tribunal observed that the ATO had previously advised the Complainant, in its letter of 18 February 2011, disallowing his appeal stating "You should discuss the details of your contributions with your fund. If the details prove to be incorrect, your fund must lodge a member contributions

statement to amend the reported details."

Further, the Tribunal was satisfied that the Complainant provided the Trustee with the ATO's letter of 12 May 2009, shortly after its receipt by him, warning him that the 'member contribution statements' (provided by the Trustee) of 3 November 2008 appeared to suggest that, "the contributions made to your funds exceeded at least one of the superannuation contributions caps." The Trustee acknowledged this error via letter to the Complainant and advised it was "working with the ATO to have the report fixed. All re-reporting will be done to the ATO by the 10th June 2009."

However, the Tribunal noted that there was no evidence that any further action was taken by the Trustee and that it was only in October 2010 that the Trustee advised the complainant that it had not received the contribution form sent in April 2008, and that the contribution could not be changed from employer to personal.

The Tribunal was satisfied that the Complainant had not requested a s290-170 form from the Trustee, nor received any such completed form from the Complainant and, accordingly, was prevented from issuing an acknowledgment under that provision. The Tribunal was also satisfied that the obligation to lodge a s290-170 form was that of the Complainant or his adviser.

Nevertheless, the Tribunal considered that the Trustee, given the clear representation made in its letter of 8 June 2009, should have lodged an amending member contributions statement with the ATO, on or about 10 June 2009, correcting the Complainant's contributions details as previously advised by it on 3 November 2008.

This return, had it been lodged, would have shown that the Complainant's contribution of $88,000, incorrectly recorded as an employer contribution, should have been amended to personal.

The ATO had repeatedly advised the Parties that the lodgement of an amended member contributions statement was the appropriate method for rectifying these recording errors. The Tribunal considered that the Trustee's refusal to lodge such an amended contributions statement with the ATO was not fair and reasonable in relation to the Complainant in the circumstances. Further, the Tribunal did not consider it fair and reasonable that the Trustee was not, at the time of the determination of the complaint, prepared to lodge the amended statement with the ATO, despite it being encouraged by the ATO to so do.

The Tribunal determined to set aside the decision of the Trustee and directed the Trustee to lodge with the ATO an amended member contributions which should itemise that the Complainant made only one contribution of $88,000 in the tax year 2007-2008, and should identify this as a personal superannuation contribution, rather than an employer superannuation contribution, as was erroneously recorded in its statement.

D13-14\164. Death Benefit

Two Complainants complained that the decision of the Trustee to pay 40% of the benefit arising on the death of the Deceased Member to each of them and 20% to the Joined Party was unfair and unreasonable, and that the entire benefit should be shared between the two Complainants. The Tribunal determined that the Joined Party was not a dependant of the Deceased Member, and therefore was not eligible to receive a portion of the death benefit. The Tribunal set aside the decision of the Trustee and determined that the death benefit be paid to the Complainants.

The Deceased Member died on 1 June 2009. He was survived by the two Complainants who were his minor daughters, his former de facto spouse

and her two daughters, and his mother - the Joined Party and her spouse. The Trustee determined to divide the benefit between the Complainants and the Joined Party. On 30 April 2012 the Complainants each lodged complaints with the Tribunal that the decision of the Trustee to pay 40% of the benefit arising on the death of the Deceased Member to each of them and 20% to the Joined Party was unfair and unreasonable, and that the entire benefit be shared between them.

The Trustee identified the potential beneficiaries as the Complainants, the Complainants' mother and the Joined Party. It was not in dispute that the Complainants were dependants of the Deceased Member, being his children and therefore within the definition of 'child' in the Trust Deed.

The Complainants' mother did not elect to join the complaint and did not claim any part of the benefit for herself. The Tribunal was satisfied that it was fair and reasonable for the Trustee not to consider her in the distribution of the benefit.

The Joined Party submitted that she was a dependant of the Deceased Member by virtue of financial dependency, although she also completed an interdependency questionnaire for the Trustee. The Trustee determined that the Joined Party was financially dependent on the Deceased Member. The Complainants submitted that the Joined Party was not financially dependent on the Deceased Member and therefore not entitled to any part of the benefit.

The first issue for determination was, therefore, whether it was fair and reasonable in the circumstances for the Trustee to determine that the Joined Party was a dependant of the Deceased Member at the time of his death. She meets the definition of 'dependant' if she is financially dependent or if she was in an interdependency relationship with the Deceased Member at the time of his death.

In support of her claim of financial dependency, the Joined Party stated that the Deceased Member bought food for her household and paid money into her account in relation to a car and insurance.

The Tribunal sighted bank statements in the name of the Joined Party and her spouse, showing deposits from the Deceased Member for $150 described as 'car payments'. The deposits ceased on 23 December 2008.

The Tribunal was not persuaded that the Joined Party was financially dependent on the Deceased Member at the time of his death. The deposits from him into the Joined Party's account appeared to be repayments for her car that he had purchased and they ceased in December 2008. Any outstanding balance relating to the car would be a liability of the estate.

The Joined Party also submitted that the Deceased Member contributed food and groceries when he went for dinner at the Joined Party and her spouse's home, however in the Tribunal's view this did not represent regular financial support such as to make her financially dependent on the Deceased Member.

In relation to whether the Joined Party and the Deceased Member were in an interdependency relationship at the time of the Deceased Member's death, the Tribunal noted that he was not living with her at the time of his death, although the Joined Party claimed he had an intention of living with her in the future had he secured work closer to their home. Accordingly, given that living together at the date of death is a requirement of an interdependency relationship, the Tribunal determined that the Joined Party and the Deceased Member were not in an interdependency relationship at the time of his death.

The Tribunal acknowledged the difficult financial circumstances of the Joined

Party. Nevertheless, having carefully considered the information provided by the Joined Party, the Tribunal was of the view that she was not a dependant of the Deceased Member at the time of his death as they were not in an interdependency relationship, and the Joined Party was not financially dependent on the Deceased Member.

It followed that, having determined that the Joined Party was not a dependant of the Deceased Member, she was not eligible to receive a portion of the death benefit. The Complainants were dependants of the Deceased Member and he was paying child support for their benefit. In the circumstances, the Tribunal's view was that the Complainants had a reasonable expectation of some ongoing financial support from the Deceased Member had he not died. The Tribunal therefore determined to set aside the Trustee's decision in relation to the distribution of the death benefit and substitute its own decision, that the benefit should be shared between them.

In relation to the appropriate division of the benefit, the Tribunal noted that at the time of his death in 2009, Complainant 13 years old a and Complainant 2 was 3 years old. In the Tribunal's view it would have been fair and reasonable for the 20% that the Trustee determined was payable to the Joined Party to be paid to Complainant 2 because of the age difference between them.

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