

## Chairperson's report

### 2011-12 annual report

The Tribunal's 2011-12 annual report was tabled in parliament on 29 October 2012. The report summarised the work of the Tribunal during a year when the number of complaints received increased by 6.5% to 2,619.

Death benefit distribution complaints made up the largest single category of complaints, comprising 32.4% of all complaints received within jurisdiction (down slightly from 33.2% the previous year).

During the year, the Tribunal also commenced a major project to re-engineer its complaints resolution process. This involved an analysis of the Tribunal's current work and processes, together with stakeholder interviews, and resulted in a number of improvement opportunities which have been, and are being, implemented. One particular change of note is a revised organisation structure under which complaints analysts have responsibility for end-to-end complaints resolution.

The report also reflects a new communication approach for the Tribunal with a greater focus on community and industry engagement.

### A case for good communication

Last bulletin I highlighted the need for good communication with members and noted that a number of complaints

received by the Tribunal appear to start because of a delay or perceived lack of attention by a fund to a concern or issue and then escalate if the fund's response does not address the member's real complaint. This bulletin I would like to continue that discussion and highlight the comments provided by a complainant in a recent case. He said:

*This claim is another chapter in an appalling saga of poor service by [the fund]. Please note the time since the original complaint – 19 December 2008. I received notification the complaint was referred to [the complaints department] on 27 May 2009 and there was no other contact until I telephoned on 5 May 2009 and left a message to be phoned back. With no response I phoned again on 11 May 2009...*

*The initial complaint was initially handled with disrespect by the telephone staff who told me the [relevant] information was located on the website and to look it up. I told her I could find no reference to [it]...After half an hour while I waited on the telephone, she could eventually only find a reference in an old newsletter. No apologies, just "contact the complaints department".*

The complainant felt that this disrespect was carried into the follow up of the complaint, in particular the absence of contact by the fund for clarification and the tone of the decision which implied

that the fund did not have a responsibility to provide all relevant information so as members could make informed decisions.

Could this complaint been avoided or at least not have escalated as it did, if the fund had been more mindful of how it communicated with its members?

### Tribunal to launch new website

The Tribunal will launch its new website in February 2013. As well as providing a more modern and streamlined look and feel, the new website offers significant enhancements to the current version, including:

- Improvements in user navigation through simplified menus to facilitate intuitive access to information;
- enhanced search functionality to make it easier to search for Tribunal determinations; and
- an online complaints lodging function.

The online complaints lodging function also enables complainants to attach supporting documentation to their complaints for faster assessment of jurisdiction.

These enhancements aim to provide a more effective and user-friendly service for complainants.



**Jocelyn Furlan**  
**Chairperson**

## Statistical overview

### Quarterly statistics – October – December 2012

#### Telephone inquiries

The Tribunal received 2,711 telephone calls this quarter (last quarter – 3,015), which is a decrease of 10% compared with the previous quarter.

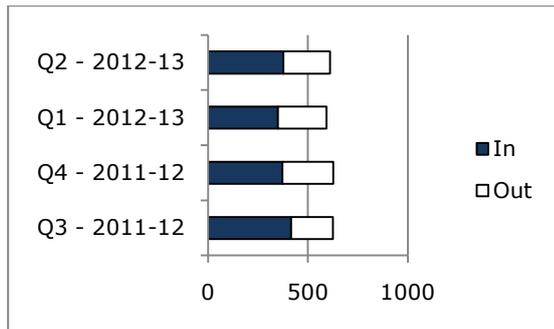
The Tribunal dealt with a wide range of inquiries, the most popular were queries about the Tribunal itself (43.4%), followed by complaint related inquiries (20.5%).

#### Written complaints

This quarter, the Tribunal received 611 written complaints (last quarter - 592), which is an increase of 3.2% compared with the previous quarter.

#### Jurisdiction

Of the 611 written complaints received this quarter, 377 (61.7%) complaints were within jurisdiction (previous quarter – 59.1%). Of the 234 (38.3%) complaints closed as outside jurisdiction, 156 (66.6%) 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 53.7%).

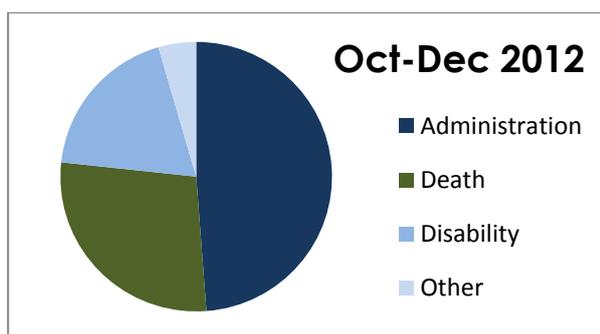


Complaints within jurisdiction

### 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 – 48.8% (last quarter – 42%). Death complaints made up the second-largest category at 27.9% (last quarter – 38%), followed by disability at 18.8% (last quarter – 14%). Other complaints made up 4.5% (last quarter – 6%).



Nature of written complaints within jurisdiction

## Performance

### Complaints finalised

The Tribunal finalised 555 written complaints this quarter, a decrease of 12.1% compared to the previous quarter.

Of the 555 finalised complaints, 5.2% were finalised at review (last quarter 3.3%), 51.4% were finalised at the inquiry and conciliation stage (i.e, prior to a review hearing) (last quarter – 53.2%) and 43.4% were outside jurisdiction (last quarter 43.5%).

### Conciliation conferences

The Tribunal conciliated 111 cases in the quarter, a decrease of 9.7% on last quarter's 123.

Of the 102 cases concluded, settlement was achieved in 54, resulting in a settlement rate of 52.9% (last quarter – 52.6%). 9 cases were adjourned in the quarter.

### Nature of conciliation cases

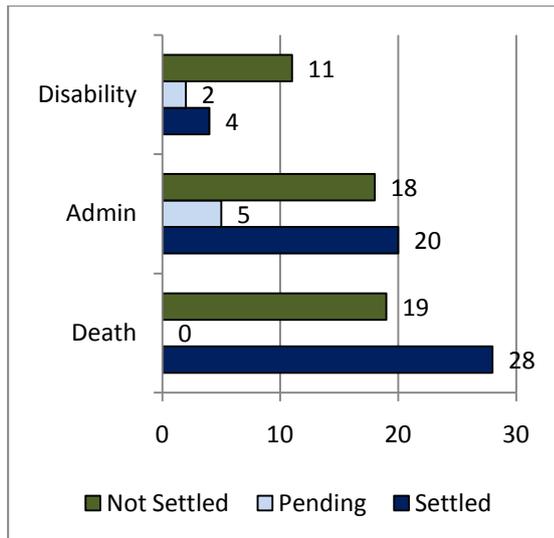
The categories of note in the quarter are as follows:

Death benefits – Of the 47 concluded cases, 28 (59.6%) were settled.

Administration – Of the 38 concluded cases, 20 (52.6%) were settled.

Disability – Of the 15 concluded cases, 4 (26.7%) were settled.

Other – of the 2 concluded cases, both (100%) were settled.



Settlement by conciliation

### Review determination outcomes for the quarter

The Tribunal determined 29 cases this quarter (last quarter – 21 cases).

The largest category of complaints determined at review was administration complaints: 15 (51.7%)

| Admin        | Qtr | YTD |
|--------------|-----|-----|
| Affirmed     | 13  | 22  |
| Remitted     | 0   | 0   |
| Varied       | 0   | 0   |
| Set aside    | 2   | 2   |
| <b>Total</b> | 15  | 24  |

Disability complaints made up the second largest category: 9 (31%)

| Disability   | Qtr | YTD |
|--------------|-----|-----|
| Affirmed     | 7   | 12  |
| Remitted     | 0   | 0   |
| Varied       | 0   | 0   |
| Set aside    | 2   | 3   |
| <b>Total</b> | 9   | 15  |

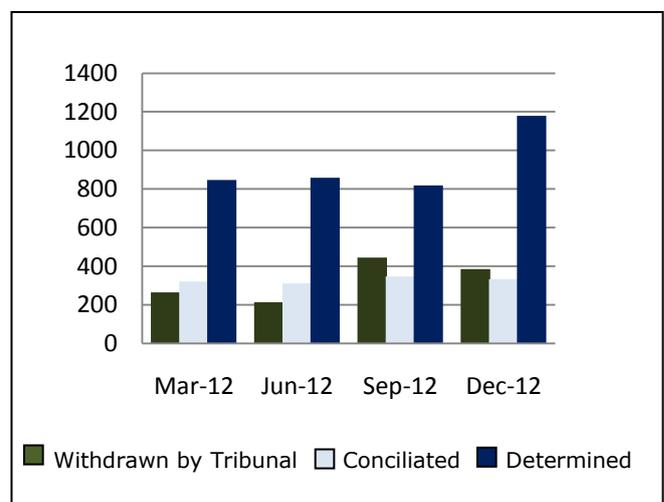
Followed by death benefit complaints: 5 (17.3%)

| Death        | Qtr | YTD |
|--------------|-----|-----|
| Affirmed     | 2   | 5   |
| Remitted     | 0   | 1   |
| Varied       | 0   | 0   |
| Set aside    | 3   | 5   |
| <b>Total</b> | 5   | 11  |

75.8% of trustee decisions were affirmed during the quarter, compared with 80.9% last quarter.

### Efficiency

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



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

# Recent determinations of interest

## **D12-13\026. Administration**

*The complainant lodged a complaint with the Tribunal that the decision of the trustee to refuse to compromise his claim for losses suffered as a result of his crystallised defined benefit being invested in the fund's default option was unfair and unreasonable as the fund failed to provide him with timely and accurate information regarding his account and its status prior to receipt of his benefit. The Tribunal agreed and set aside the trustee's decision.*

The complainant was a defined benefit member who also had a separate accumulation account in the fund. On 9 January 2009, the complainant retired from his employer and his defined benefit crystallised. According to fund rules, the trustee transferred the complainant's benefit to his existing accumulation account pending instruction on where and how the benefit was to be invested. Following receipt of the complainant's instructions on 25 February 2009, the benefit was transferred to the Personal Division of the fund on 11 March 2009.

In his submission to the Tribunal, the complainant advised that prior to his retirement he engaged a financial planner, who was an authorised representative of the fund, to assist him with his retirement plans. A series of emails between the financial planner and the fund occurred from 6 January to mid-February seeking clarification of the complainant's benefit amount. The fund confirmed the valuation of 9 January 2009 (the date of the complainant's retirement) in a letter to the financial planner dated 2 February 2009. The letter did not contain any advice that the valuation was subject to fluctuations. As the quote was unchanged, the complainant stated that he thought the benefit would remain the same until

rollover instructions were provided, an opinion he stated was shared by his financial planner. The complainant argued that as a defined benefit member he expected a certain benefit upon retiring which fluctuated with movements in salary not investment returns. He stated that "DB members take comfort in this rock solid knowledge."

The trustee in its submission stated that it had no other option than to invest the converted defined benefit into the complainant's default investment option as it had not received instructions to the contrary. Further, given the complainant's position at the employer where he dealt with the fund actuary and the fund administrator, it was reasonable to assume the complainant should have been aware of the rules relating to payment of the fund's defined benefits. Moreover, it was incumbent on a member to be aware of the circumstances of their benefit.

It was not in dispute that the fund's policy at the time the complainant left the fund was to invest crystallised benefits in its default investment option. Rather the Tribunal considered whether the complainant should have been aware of the trustee's policy and, if he was not aware, whether he would have acted differently had he known of its existence.

The Tribunal considered the communications from the fund to the complainant. The Tribunal noted that there was no mention of the fund's interest policy for defined benefits in its annual reports to members. The leaflet dated 19 March 2009 which accompanied the complainant's 30 June 2008 benefit statement was also silent on the matter as were the quotations provided to the complainant showing his final benefit amount. The Tribunal noted the following in the fund's 2008 annual report:

A practical and convenient option for your super is to transfer to the [Fund] Personal Super...If we hear that you're leaving your employer, we'll write to you with

more information and you'll be transferred across after 60 days from the date of our letter...On transfer you'll have the same investment strategy (which you can change at any time).

The complainant submitted to the Tribunal that he thought he had 60 days in which to decide on his investment option for his new Personal Super account within the fund. The Tribunal considered that, as the complainant was transferring his benefit into another section of the same fund, it was reasonable for him to assume that his defined benefit amount would be the amount transferred effective at the date of leaving employment.

The Tribunal noted that the trustee submitted it was incumbent on the complainant to be aware of the circumstances of his benefit and that, if he had asked about the investment of his benefit, he would have been told. However, the Tribunal considered that a trustee acting fairly and reasonably would have recognised that it had a responsibility to ensure that members are aware of circumstances surrounding their benefit payments. In fact, the Tribunal noted that the trustee, in a note accompanying the quotation of the complainant's benefit, conceded that "the Trustee is obliged to provide a member with any information reasonably required to understand your benefit entitlements." While there was a disclaimer in the complainant's exit quotation stating that it was an estimate only and did not accurately indicate his actual entitlement, the Tribunal considered that this note did not give information concerning the investment of the complainant's benefit and could have been there to cover the fact that the quotation did not include the employer's final contributions.

The trustee also affirmed that the financial planner was not an agent or delegate of the trustee. However, the Tribunal considered that, if the financial planner was not aware of the policy of the trustee to invest crystallised defined benefits as at the date of termination of

employment in the default investment option, it was unlikely that the complainant would be aware considering that the policy does not appear to be published in any relevant communication material. Further, the Tribunal was not convinced by the trustee's argument that the complainant should have known about the payment of defined benefits from the fund due to his position with the employer. The Tribunal was satisfied that, while the complainant appeared to be familiar with the concept of defined benefits and their calculation, there was no reason to assume that he knew about the fund's interest policy just because he had been involved in retrenchment programs.

The Tribunal found no reason to dispute the claim that had either the financial planner or the complainant known about the crystallisation and investment of his crystallised benefit as at the date of termination of employment, they would have requested that the fund reallocate his benefit sooner. Accordingly, the Tribunal set aside the trustee's decision and substituted its own that the trustee compromise the complainant's claim by payment of the amount equaling the investment losses he incurred on his crystallised defined benefit from his date of termination of employment until the date of rollover to the Personal Super division.

### **D12-13\030. Administration**

*The complainant lodged a complaint with the Tribunal that the decision of the trustee to decline to compensate him for the difference between the lump sum benefit estimate provided to him and the amount of the lump sum benefit paid to him was unfair or unreasonable. The Tribunal found that the trustee provided sufficient disclaimers and warnings on the benefit estimate and there was no evidence of reliance and loss on the part of the complainant. The Tribunal, therefore, affirmed the trustee's decision.*

On 15 September 2008, the fund provided the complainant with an estimate of his benefit on retirement in

December 2008. The estimate used an assumed annual earning rate of 4.5%. His actual benefit was less than the estimate. The complainant stated that the advice provided to him by the fund on 15 September 2008 was misleading and the result of defective administration. The complainant stated that he did not expect an ex gratia payment of \$68,000 (the difference between the estimate and the final payment), however, he believed that some acceptance of responsibility would be appropriate, "say 33% of that amount."

He argued that the fund must have known before September 2008 that there was a negligible prospect of it reaching the assumed earnings rate of 4.5% as investment performance information on the fund's website showed negative returns in 6 of the 12 months before September 2008 and his member exit statement showed a net return for the period 1 July 2007 to 15 January 2009 of minus 15.17%. While he acknowledged that the September estimate included a disclaimer he did not believe that this absolved the fund of its responsibility to provide a realistic estimate that reflected the fund's knowledge at the time. He affirmed that it was "difficult to accept that [the fund] did not know in September 2008 that the prospect of a 4.5% earning rate in December was unrealistic and therefore misleading."

The complainant also complained that he was charged negative interest for a whole month after he exited the fund simply because that was the time taken by the fund to process his benefit. The complainant did not question the legality of the fund's rules relating to earnings calculations or suggest that the time taken by the fund to process his benefit was unreasonable, however, he submitted that there was no compelling reason why the entitlement of departing members could not be quarantined on their nominated date of retirement and relevant calculations made accordingly.

The trustee stated that, as a result of a bulk mail out in June 2007, the

complainant ought to have been aware that benefits are calculated using the earning rate applicable at the date of processing. In its submission the trustee submitted that it acted fairly and reasonably in using an earning rate of 4.5% as the default fund had earned 4.9% over the previous ten years. Further, it stated that "a mere expectation of a future amount and the disappointment of that expectation is not of itself a compensable loss."

The Tribunal considered statements in the 'Assumption used to calculate your benefit' and the disclaimer on the complainant's benefit estimate, which stated the following:

*The assumed fund earnings rate (4.5%) is the current stated long-term earning rate objective of the fund. The Fund earning rate changes daily, so the figures provided in this benefit estimate will differ from the amount paid to you at the time your benefit is paid and that amount will depend on the actual performance of the Fund.*

This disclaimer clearly set out that the complainant's benefit amount was subject to any divergence in actual investment performance from the estimated long term return.

Whilst the Tribunal agreed with the complainant that disclaimers did not absolve a trustee of its duty of care to members, it affirmed that it could only place the complainant in the position he would have been but for any unfairness or unreasonableness on behalf of the trustee. The complainant did not claim to have entered into financial commitments in reliance on the estimate or to have suffered loss other than the loss of an expected higher benefit. Accordingly, the Tribunal found the trustee's decision to not compromise the complainant's claim was fair and reasonable because there were sufficient disclaimers and warnings on the benefit estimate and there was no evidence of loss on the part of the complainant. In relation to the second aspect of the complainant's complaint,

the Tribunal noted that the calculation of the complainant's benefit was in accordance with the rules of the fund. The Tribunal, therefore, affirmed the trustee's decision.

#### **D12-13\034. Death Benefit**

*The three complainants, two adult sons and an adult daughter of the deceased member, lodged a complaint with the Tribunal that the trustee's decision to distribute the death benefit, 40% to the girlfriend as a financial beneficiary, 30% to the daughter as a financial dependent and 10% each to the three adult sons as non-financial dependents was unfair and unreasonable. The resolution sought by the complainants was that the entire benefit be paid to the daughter in accordance with the deceased member's preferred nomination. On review of the evidence before it, the Tribunal determined to split the benefit 50/50 between the girlfriend and the adult daughter as financial dependants.*

On 21 December 2009, the trustee advised the complainants and other potential beneficiaries of its intention to pay the benefit in the following proportions: 80% to the girlfriend as a financial beneficiary, 5% to the daughter as a financial dependant and 5% each to the three sons as non-financial dependants. On 27 December 2009, the complainants wrote the trustee objecting to the proposed distribution. By letter dated 1 June 2010, the trustee wrote to the complainants setting out its amended proposal to pay the death benefit, 40% to the girlfriend as a financial beneficiary, 30% to the daughter as a financial dependent and 10% each to the sons as non-financial dependents. By letter dated 27 June 2010, the trustee wrote to the complainants affirming its decision. The amount of the death benefit payable was \$131,846.00, which included an insured sum of \$120,000.

The Tribunal was satisfied that the complainants and the girlfriend were all potential beneficiaries under the SIS Act. It was also satisfied that the girlfriend and daughter were both partially

financially dependent on the deceased member.

The daughter, in her statement of financial circumstances, provided details that the deceased member made payments to her on a regular basis ranging from \$50 - \$200 per month and produced bank statements which showed deposits to her account from the deceased member. She also submitted that in the later years the deceased member gave her money in cash and not through deposits in her account.

The girlfriend, in her statement of financial circumstances, provided details that she was unemployed and that the deceased member paid rent in the sum of approximately \$355 per week. Evidence was also produced that utilities were paid by the deceased member. The Tribunal noted the differing views as to the nature of the relationship between girlfriend and the deceased member, however, it affirmed that the quality of the relationship did not determine the question of dependence, thus whilst the relationship was categorised as 'strange' by some parties, it does not deny it was a relationship. In these circumstances it was not necessary for the Tribunal to determine whether she was in fact the deceased member's de facto as financial dependence is a separate and sufficient ground for a potential beneficiary to be a recipient of the death benefit.

The Tribunal also noted that the trustee did not identify the deceased member's spouse or the minor son of the girlfriend as potential beneficiaries, and it ought to have done so. Although having been separated for some time, the deceased member and the spouse were married at the time of death and, therefore, the spouse was a dependant under the SIS Act. The minor son lived with the deceased member and the girlfriend at the time of death and evidence before the Tribunal indicated that the minor son was at least partially financially dependent on the deceased member and that the deceased member paid intermittent financial support for him.

Having determined the potential beneficiaries, the next issue the Tribunal considered was the fairness and reasonableness of the trustee's distribution of the benefit. The adult sons did not provide any evidence as to any financial relationship with the deceased member and did not claim any financial dependency on him or seek payment of any of the benefit for themselves. The minor son also did not seek payment of any of the benefit in his own name. However, the Tribunal noted that as he lived with his mother, the girlfriend, any benefit to her would also benefit him.

In its assessment of the complaint, the Tribunal considered 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 he not died. Further, it noted that the death benefit included an insured sum of \$120,000 which would not have been payable had the deceased member not died prior to retirement as the purpose of the insured sum is to replace the future income lost as a result of the death of the deceased member prior to his reaching retirement age.

It was clear to the Tribunal that the only persons who had an expectation of ongoing financial support from the deceased member had he not died were the daughter and the girlfriend (and through her, her minor son). The Tribunal noted the daughter and the deceased member had a close relationship, which was evidenced by the regular contact between them, the emotional and financial support provided and the fact the deceased member nominated her as his preferred beneficiary. Accordingly, she had a reasonable expectation of ongoing financial support from the deceased member had he not died. Equally, the Tribunal noted the deceased member and the girlfriend had endured a long relationship of approximately 8-9 years with at least 2 significant break periods, but were ultimately together at the time of the deceased member's death. They shared expenses including the rent and

utilities. The amount contributed by the deceased member was sufficient to establish partial dependency and in this instance was sufficient to satisfy the Tribunal that there was a reasonable expectation of ongoing financial support from the deceased member had he not died.

Taking these factors into account, the Tribunal was of the view that a fair and reasonable decision was that both the girlfriend and the daughter were entitled to share in the death benefit, and, on balance, that it would be fair and reasonable that the benefit be split equally between them. The distribution of half of the benefit to the girlfriend would also provide a benefit to her minor son.

#### **D12-13\037. Disability Benefit**

*The complainant complained that the trustee's decision to reject his claim for a total and permanent disability (TPD) benefit was unfair and unreasonable because he met the eligibility requirements. He also submitted that the fund had failed in its communication pertaining to TPD coverage. However, the Tribunal determined that the complainant had not provided sufficient evidence in support of his claims and affirmed the trustee's decision.*

The complainant joined the former fund on 15 July 1996. On 1 November 1996, the former fund introduced automatic cover for TPD benefits for full time employees and issued a new Key Features Statement and Fund Information Brochure. Under a subheading 'Important Notes' it stated:

TPD benefits are not available to Members who work on average over 6 consecutive months less than 20 hours per week. Those who work less than 20 hours per week are insured for Death only benefits at a cost of \$0.95 cents per Member per week.

From 30 June 1997 – 2004, the complainant's annual membership statements showed that he had an

insurance benefit on death with no mention of TPD benefits.

The complainant's employment with the employer was terminated on 10 December 2004. On 15 October 2005, all assets and members were transferred from the former fund to the fund.

On 24 February 2006, the complainant lodged a claim for a TPD benefit with the fund. In the employer's statement attached to the claim was the question "What were the average hours worked per week?" The answer given by the employer was "17.5" and it was also noted that the complainant worked part time. Similarly, a letter from the complainant's lawyer to the fund in August 2006 stated that the complainant "was employed for 17.5 hours weekly immediately prior to the TPD date." In subsequent correspondence from December 2006 – October 2007, the complainant's lawyer reiterated that the complainant worked 17.5 hours per week but argued that the complainant was never properly informed of the 20 hour rule and that he had been paid his premiums and thought he was fully covered for TPD.

In December 2008, the complainant provided a statutory declaration to the fund stating that during his eight years of employment, he had been paid for 17.5 hours per week but had worked on average, more than one additional hour per day for which he was not paid. In December 2009, the employer provided a statutory declaration stating that on average the complainant worked for, and was paid for, 21 hours per week. However, he was unable to provide a wage book in support of his statement and advised that timesheets had since been destroyed.

It was not in dispute that, under the policy, a fund member must work at least 20 hours per week on average over a six month period prior to a claim event in order to be eligible for TPD cover. The Tribunal noted that there were a number of pieces of correspondence from the complainant, his lawyers and the employer stating that the complainant

was employed to work 17.5 hours per week. The Tribunal further noted that once the complainant's TPD claim had been denied for ineligibility then the complainant, his lawyers and the employer submitted that he was contracted for 17.5 hours but had actually worked more hours than this per week. The submissions differed in whether these extra hours were paid or unpaid.

The complainant submitted that the 20 hour requirement had been satisfied and the trustee and insurer should accept the submission from the employer as to the number of hours worked given that the relevant timesheets and the wage book could not be produced. However, the Tribunal considered that it was incumbent on the complainant to provide some supporting evidence of the hours he worked given that there was inconsistency in the submissions by the complainant, his lawyers and the employer. The Tribunal further considered that it was unreasonable of the complainant to expect the trustee to accept the later evidence over the original evidence with nothing to support it. The Tribunal noted the trustee's submission that, if the timesheets and wage book were not available, then it would consider pay slips, bank records or tax returns. The Tribunal considered that, as the employer had stipulated that the additional hours over 17.5 hours were paid, then the documents suggested by the trustee would support the employer's position. The Tribunal further noted that the trustee was prepared to reconsider the complainant's claim if he could produce satisfactory evidence as to the hours worked but that had not been forthcoming.

The complainant submitted that he was not aware that he was not covered for TPD under the fund as he paid the same premiums as his full time colleagues who did have TPD cover and he had not received any correspondence informing him to the contrary. The Tribunal considered that the evidence before the Tribunal did not support the complainant's assertion that he did not receive any material informing him of

the application of the 20 hour rule. The complainant stated that he did not receive the relevant KFS but the Tribunal noted that none of the complainant's annual member statements gave any indication that he was covered for TPD benefits and they all referred him to the fund's annual reports which referred to the 20 hour rule. It did not appear to the Tribunal that the complainant had ever received any communication material from the fund that implied that he was eligible for TPD cover if he worked less than 20 hours per week.

The complainant also submitted that he thought he was covered under a separate insurance policy which had a threshold of 15 hours work per week for TPD cover. The Tribunal noted that the former fund application form signed by the complainant on joining showed the name of the former fund clearly at the top of the front page and that the complainant signed his name under the statement:

I confirm that I have received a Fund Information Brochure from the Trustee of [the Former Fund] providing information regarding my benefit entitlements from the fund.

The Tribunal was, therefore, satisfied that if the complainant was of the belief that he was a member of another fund, it was not because of any incorrect documentation provided by the trustee.

With regards to insurance premiums, the complainant submitted that he assumed that he had the same benefits as his full time colleagues as he paid the same premium. While this may be so, the Tribunal considered that this was not an issue for the trustee as in all its relevant communication material it had distinguished between the benefits for full time and part time employees. The Tribunal also noted that although full time and part time employees paid the same level of insurance premium, the part time employees were covered for a higher benefit on death than the full time employees to offset the fact that the full time employees were also covered for

TPD. The Tribunal was satisfied that any assumption made by the complainant as to his level of benefits was of his own making and not implied by any of the fund communication material. The Tribunal, therefore, affirmed the trustee's decision.

### **D12-13\043. Administration**

*The complainant sought compensation for losses she incurred because of a decision she made on the basis of repeated misinformation from the fund. She argued that because of a series of incorrect benefit statements which overstated her benefits, she had decided to make a large cash withdrawal and accept a redundancy, which she would not have done had she been aware of her correct account balances. However, the Tribunal was unable to quantify her loss and was not persuaded from the evidence before it that she would have acted differently had she known the correct balances of her accounts. The Tribunal, therefore, affirmed the trustee's decision.*

The complainant's superannuation entitlements comprised a defined benefit component and an accumulation component. On 28 April 2004, in accordance with court orders, a payment split of \$122,000 was paid to the complainant's former spouse from her superannuation entitlements in the fund. \$107,253.25 was deducted from her defined benefit by way of an adjustment to her service fraction which reduced the total number of years of contributory service. The remaining \$14,746.75 was deducted from her accumulation component. Her statement as at 30 June 2004 reflected this adjustment. However, in 2006 the fund's membership records were transferred to a new administration system and the adjustment to her defined benefit component (\$107,253.25) was mistakenly added back to her accumulation component, which resulted in her superannuation entitlements being overstated and incorrect statements being issued for 31 December 2006, 31 December 2007 and 17 January 2008.

On 2 April 2008 the complainant accepted redundancy from the employer and she received a redundancy payment of approximately \$102,000. On 25 June 2008 the complainant withdrew \$140,000 from her superannuation. As the correct balance of her accumulation component was insufficient to cover the withdrawal, \$79,118.55 was deducted from her defined benefit by an adjustment to her service fraction.

In her submission, the complainant argued that if she had not been misled as to what her benefits were, she would not have left full time employment on 31 March 2008, withdrawn \$140,000 in cash thereby losing some of her defined benefit and she would have sought full time work. Her decision to retire was made on the basis that she had enough funds in her account and that her defined benefit balance was \$283,742 and her accumulation balance was \$168,240. If she had known that she only had \$209,321.95 in her defined benefit, she would have continued in full time permanent work until retirement at a much later age, albeit at a lower salary. She expected her cash withdrawal of \$140,000 to reduce her accumulation benefit, and wanted to maintain her defined benefit. She stated that she would not have made the withdrawal if she had been aware that it would reduce her defined benefit.

It is not in dispute that the trustee made errors in 2006 that resulted in the complainant's benefits being overstated. The trustee made a number of errors in relation to the complainant's account which resulted in her accumulation account being overstated and gave the complainant the impression that she was able to withdraw \$140,000 from her accumulation account and leave her defined benefit account intact.

The issue for the Tribunal was the fairness and reasonableness of the trustee's refusal to compensate the complainant for its errors in the complainant's circumstances. The complainant stated that, had she known that cashing in \$140,000 would reduce

her defined benefit component, she would not have taken redundancy in April 2008. In considering this aspect of the complaint, the Tribunal also took account of the complainant's statement that she did not want to continue working at a lower salary because a lower salary would reduce the amount of her defined benefit. The Tribunal also noted that the complainant was back in full time employment at a lower salary level. The complainant also received a redundancy payment of approximately \$102,000 from her employer that she would not have received had her employment not been made redundant. On balance therefore, although the Tribunal accepted that the complainant placed some reliance on the incorrect amount quoted as her accumulation balance, because of the other circumstances of the amount of employer redundancy payment received and the complainant's wish to maintain her salary level, the Tribunal was not persuaded from the evidence before it that the complainant would not have taken the redundancy had she known the correct amount of her balances.

The complainant also said that had she known that the cash withdrawal would reduce her defined benefit she would not have taken the cash withdrawal. The Tribunal noted the uses to which the funds had been put, which were entirely a matter for the complainant. The funds did not appear to have been 'lost' and it might be open to the complainant to re-contribute them into her superannuation should she regain access to some or all of them, which could put her back in the situation she would have been in if she had not taken the withdrawal.

The Tribunal was not able to quantify any loss to the complainant because of the errors. The reduction in her defined benefit component was offset by the benefit of the cash withdrawal and the employer redundancy payment that she would not otherwise have received. Moreover, in the absence of any identifiable loss, the Tribunal was unable to find any unfairness or unreasonableness in the trustee's decision to refuse to compensate the

complainant in the circumstances. The Tribunal, therefore, affirmed the trustee's decision.

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