

The Pensions Ombudsman is an independent body, established under the *Pension Schemes Act 1993*, which is tasked with investigating complaints from actual and potential beneficiaries of occupational and personal pension schemes.

This includes complaints about alleged maladministration, the provision of incorrect information and failures to comply with the provisions of the scheme rules.

Where the Ombudsman investigates a complaint, it will issue a decision (known as a Determination) which is then final and binding on both parties. The Ombudsman's Determinations are published on their [website](#).

For this Aries Insight, we will look at a few recent Determinations and consider the implications for trustees and managers of pension schemes.

Distribution of death benefits – case 1

The first [Determination](#) we will consider concerned a case involving the exercise of the trustees' discretion on the distribution of death benefits. The complainant was the widow of a deceased member of the scheme, who had separated from her husband.

The couple had separated and the complainant had moved out of the family home into rented accommodation, so that the deceased member could retain the family home as neither of them could afford to buy one another out of the mortgage. This arrangement was in order to keep the children in their

usual routine, however the couple shared care for the children and they retained joint liability for the mortgage on the family home.

The trustees of the scheme, who had discretion as to how any death benefits should be distributed to eligible dependants, decided that these benefits should be divided equally between the two children. The trustees cited various reasons for reaching this conclusion, including that:

- The trustees were satisfied that the children were dependent on their father. No dependency or interdependency in respect of the other potential beneficiaries had been demonstrated, and in any event would not be deemed, in the view of the trustees, to override the dependency of the deceased member's children.
- The member and the complainant had been separated for approximately six years and they were living independently. The complainant was not financially dependent on the member. The children had been living with, and were financially dependent on, the member.

The complainant notified the trustees of her intention to appeal against the trustees' decision. In doing so, she informed the trustees that, following the member's death, she had had a meeting with the member's bank where she was informed that he had accrued personal debts of approximately £16,000, which, as the spouse, she was now legally liable for. She also explained that arrears of mortgage payments had accrued and she was now liable for those debts too, plus the full outstanding mortgage.

The trustees treated this as a complaint under the scheme's Internal Dispute Resolution Procedure, but upheld their original decision.

Eventually the complainant raised the case with the Ombudsman who concluded that: "*... it is also clear from the decision letter that when they made their decision about how to distribute the death benefits among the eligible beneficiaries, the trustees considered there was no interdependency between [the complainant and the deceased member]. Indeed the independence of [their] living arrangements appears to have been a significant factor in the trustees' decision making. I consider that the conclusion that there was no interdependency was one which no reasonable decision maker could arrive at faced with evidence of an undissolved marriage, shared mortgage liability and joint responsibility for minor children. Albeit there may have been no evidence that one marriage partner was dependent on the other, there was clear evidence of interdependency and I make a finding of fact to that effect.*"

The Ombudsman made a direction that the trustees of the scheme should reconsider their decision to distribute death benefits due under the Rules. In communicating the outcome of this reconsideration to the beneficiaries, the trustees must state the reasons for the decision, the Scheme Rules that were used in making the decision, and what information was taken into account to reach it. In addition, the Ombudsman ordered the trustees to pay the complainant £500 to recognise the distress and inconvenience caused.

This case illustrates the importance of trustees being able to demonstrate that they have taken into account all relevant matters before deciding how to exercise their discretion as to the distribution of benefits.

Distribution of death benefits – case 2

The second [Determination](#) to consider also involves the distribution of death benefits, however the circumstances here are rather different from the previous case.

Briefly, the case involved a small self-administered scheme with only three members, all of whom were trustees of the scheme. In addition, there was a professional trustee appointed. The three individual trustees were the deceased member (Mr M), the deceased member's brother (Mr S) and Mr S's former spouse.

Following the death of Mr M, the trustees exercised their discretion as to whom the death benefits should be paid and concluded that the benefits should be distributed in accordance with the Expression of Wish ("EoW") form that had been signed by the deceased member. This form nominated Mr S as the sole recipient.

Now, usually the trustees are fully entitled to take account of any nomination made by a member when deciding how to distribute any death benefits, however the circumstances of this case are highly unusual.

It emerged that, although Mr M signed the Expression of Wish form, he did not actually complete the nomination details. Instead, Mr S subsequently

amended the form to add his own name as the nominated beneficiary and even initialled the form to note his amendment to it.

One of Mr M's daughters complained to the Ombudsman about the trustees' decision to pay all of the death benefits to Mr S. Unsurprisingly, the Ombudsman concluded that "the circumstances of the manner in which the EoW was completed and relied upon are such that it makes the EoW invalid and the Trustees should not have relied on it when making their decision. "

In most cases where the Ombudsman upholds a complaint about the exercise of trustee discretion, the Ombudsman will order the trustees to reconsider their decision (see, for example, case 1 above). In this case, however, the Ombudsman exercised a rarely used power to actually decide how the death benefits should be distributed, in line with what the Ombudsman concludes what would be the decision that a reasonable trustee would make.

As the Ombudsman said "Where I find that a decision has been improperly made I would normally ask the Trustees to make their decision afresh. However, in this rare instance I have decided not to do so. Two of the three Trustees are conflicted. One made an improper amendment to an EoW, which was to his financial advantage and the other two failed to notice this irregularity when purporting to exercise their joint trustee discretion."

The Ombudsman ordered that 75% of the death benefits be paid to Mr M's three daughters in equal proportion. In addition, the Ombudsman ordered the professional trustee to pay each of the daughters £2,000 each in recognition of the exceptional distress and inconvenience caused by their

maladministration. The remaining 25% of the death benefits was awarded to Mr S, in recognition of the support that Mr S had provided to Mr M during the period of his illness prior to his death.

It is, of course, highly surprising that any trustee can consider it appropriate to complete a member's Expression of Wish form in any circumstances. It is even more surprising that any trustee could consider it appropriate for him to complete such a form in his own favour. In such circumstances, it is clear that asking the trustees to reconsider their original decision would not be an appropriate solution, so that the Ombudsman had little option other than to impose a specific distribution of the benefits.

Refusal to transfer benefits

The final [Determination](#) we will consider concerns a case where a scheme has refused a member's request to transfer the member's benefits to another arrangement.

In this case, the proposed receiving scheme was a small self-administered scheme and the scheme holding the member's benefits ("the holding scheme") undertook a range of due diligence checks in line with industry standards to prevent transfers to potential pension scam arrangements.

As part of these checks, the holding scheme contacted HMRC to request confirmation that the proposed receiving scheme was indeed a registered pension scheme. In this instance, HMRC provided the following reply:

"You asked for confirmation of the registration status of the pension scheme named above.

We only confirm the registration status when both of the following conditions apply:

- The transferee scheme is registered with HMRC and is not subject to a deregistration notice;
- At the present time the information held by HMRC does not indicate a significant risk of the scheme being set up or being used to facilitate pension facilitation.

At this time, one or both of these conditions do not apply. Therefore, we are unable to provide the confirmation you requested about the pension scheme."

Based on this response from HMRC and a range of other concerns that the holding scheme had identified, the holding scheme notified the member that they would not be proceeding with the transfer of the member's benefits.

The member brought a complaint to the Ombudsman 's office which was ultimately considered by the Ombudsman. When considering this complaint, the Ombudsman had to consider whether or not the member had a statutory right to the transfer under the relevant legislation. As the holding scheme was a personal pension and the proposed receiving scheme was an occupational pension scheme, the relevant legislation here was Section 95 (3) of the *Pension Schemes Act 1993*, which provides that:

In the case of a member of a personal pension scheme, the ways referred to in subsection (1) [the specified ways in which a member can take a transfer] are:

(a) for acquiring transfer credits allowed under the rules of an occupational pension scheme:

- (i) the trustees or managers of which are able and willing to accept payment in respect of the member's transferrable rights, and
- (ii) which satisfies prescribed requirements;

The prescribed requirements here include the requirement in Regulation 2 of *The Personal Pension Schemes (Transfer Values) Regulations 1987* that:

the receiving scheme-

- (i) is registered under section 153 of the *Finance Act 2004* (registration of pension schemes), or
- (ii) is a qualifying recognised overseas pension scheme as defined in section 169 of that Act (recognised transfers)

The Ombudsman concluded that, as the holding scheme had been unable to establish that the proposed receiving scheme was a registered pension scheme, it was entitled to treat the proposed receiving scheme as failing to have satisfied the prescribed requirements. As such the Ombudsman concluded that the member has no statutory right to transfer to the proposed receiving scheme and that the holding scheme was justified in refusing the member's request.

This case will provide significant comfort to trustees and managers of pension schemes who receive requests to transfer in cases where HMRC decline to provide confirmation that the proposed receiving scheme is a registered pension scheme.

Did you find this Aries Insight useful?

If so, please share it with your colleagues and let them know that more information is available from the [Aries Pensions System](#).

If you have any suggestions for topics that you would like to see covered in a future Aries Insight, then please [let us know](#).

Aries Insights are produced for [Aries Members](#) by Aries Insight to highlight key legislative changes and other topics of interest. **As they are only short articles, they cannot always cover every aspect of the topic being discussed and must not be considered as legal or financial advice.**

All Aries Insights are intended to reflect the position as at the date the Insight was issued. Please consider the possibility that the relevant legislation may have changed since an Insight was issued.

Aries Insight - October 2018
