



# Pensions briefing

## Ombudsman case review – Ours IS to reason why

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### Briefing

November 2018

### Introduction

A review of recent Pensions Ombudsman determinations highlighting the need for decision-makers to be capable of demonstrating the rationale behind their decisions ...

Do trustees have to explain their decisions to affected parties? Trustees typically have power under their scheme provisions to make a variety of decisions in respect of scheme members at their sole discretion. This month's briefing takes a look at some recent decisions of the Pensions Ombudsman (TPO) relating to member death cases where Trustees have exercised discretion as to who receives death benefits. These decisions make clear the expectations of TPO in this regard and show the need for clear records and a robust process.

### What are the legal requirements?

Traditionally, the courts have held that records of trustees' discretionary decisions are not "trust documents" and therefore do not need to be disclosed to members. As far back as 1965, the Court of Appeal held in *Re Londonderry's Settlement* that "Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family, were trustees obliged to state their reasons for the exercise of the powers entrusted to them. It might indeed well be difficult to persuade any persons to act as trustees were a duty to disclose their reasons, with all the embarrassment, arguments and quarrels that might ensue, added to their present not inconsiderable burdens."

However, TPO has acknowledged that whilst the law may not strictly require decision makers to disclose their reasons, TPO views failure to provide rationale for decisions as potentially indicative of a flawed process which TPO may consider amounts to maladministration (*Allen* (2002)).

TPO is clear that its role is not to substitute a respondent's decision with his own and the key questions TPO will ask when assessing whether an exercise of discretion was proper are

- Was the decision in line with the rules and the law?
- Has all relevant evidence been considered (and nothing irrelevant)?
- Is the decision perverse or irrational?

These questions stem from the case of *Edge v Ombudsman* (1999) and have arguably been supplemented by TPO's findings. These show what TPO expects from a good decision making process and the importance of supporting decisions with clear rationale to evidence that all relevant factors have been taken into account.

### **Dr G (June 2018) – no reasons, no decision?**

Dr G's case had twice been before TPO by the time of the latest decision in June. Her partner, Mr T, had died whilst entitled to benefits under a SIPP and despite Dr G having provided substantial evidence of their personal circumstances, joint financial commitments and intentions to provide for each other in their wills etc. the scheme administrator had refused to pay her any of Mr T's death benefits.

The scheme administrator accepted that Dr G was potentially eligible for benefits under the scheme rules, but claimed that, having taken account of all the relevant factors (listed in minutes of an internal meeting), it had used its discretion to determine that she should not receive any form of death benefit. It also claimed that TPO was only able to interfere with the exercise of discretion where the decision-maker acted improperly in making their decision.

TPO found that, while the scheme administrator had taken into account all the relevant factors in making its decision, it had not shown a "causative link" between the facts and the conclusion that it reached. In the absence of any documented reason to support the decision, this suggested there was "no supportable reason" for it. Further, the administrator had placed too much weight on what Mr T would have wished to happen, rather than considering whether there was a reason to distribute benefits to Dr G given that she was both a dependant (as she was in a financial relationship of mutual dependence with Mr T) and an eligible recipient (as she had an interest in Mr T's estate) in her own right.

The absence of reasons meant it was thus impossible to establish whether the administrator had correctly exercised its discretion under the scheme rules. TPO directed the administrator to reconsider the distribution of death benefits and to communicate this decision to Dr G with a fully documented rationale for its conclusion.

### **Mrs T (March 2018) – absence of reasons betrays fact that not all relevant evidence considered**

Mr T was a member of a group personal pension scheme when he died in September 2015. In November 2013, a relative of Mr T (Mrs Y) had written to the provider informing them that Mr T wished to change his expression of wish form (EoW) to grant benefits to Mrs Y instead of to Mr T's wife, Mrs T. Mr T's will (from July 7, 2010) did not mention Mrs Y but stated that he had provided enough for his wife over his lifetime so made no specific provision for her in his will. The provider distributed the benefits to Mrs Y.

TPO held that the provider had failed to seek appropriate relevant evidence before making its decision. If it had contacted Mrs T, it would have discovered that a Court of Protection Order was issued in January 2013, which made clear that the member did not have the mental capacity to nominate another beneficiary after that date. When it was subsequently made aware, it simply stated that it had followed the EoW and the will.

TPO held that the fact that the provider had not given reasons as to why it preferred to accept the EoW (despite evidence that it was irregular and potentially invalid), demonstrated that the provider had not taken all relevant evidence into account.

The provider should have taken further steps to obtain the relevant evidence from Mrs T, as well as that provided by Mrs Y, prior to making a decision about the distribution of the death benefits. TPO directed the provider to reconsider Mrs T's application to receive the death benefits and notify her of its final decision, with reasons.

### **Mrs S (July 2018) – sometimes the reasons themselves can be called into question**

Mrs S was living separately from her husband when he died but they remained jointly responsible for a mortgage and had shared care of their two children. Following a series of discussions and exchanges during which Mrs S provided detailed evidence of joint financial commitments, the trustees decided to pay a death-in-service lump sum and dependent's pension to the member's children. They did so after finding that there was no interdependency between Mr and Mrs S (and even if there had been it would not have outweighed the children's interest).

TPO agreed that the trustees had taken the relevant scheme rules into account and had made attempts to consider all the relevant information. They had tried to make a "proper decision" and had correctly established the widow to be a potential beneficiary. The trustees had similarly acted correctly in assessing whether the member's circumstances had changed since he signed a nomination form naming his wife as sole beneficiary in 2004.

However, TPO commented "in order to show that they gave proper consideration to all relevant matters and excluded irrelevant ones, the Trustees must be able to demonstrate their reasoning in light of the evidence before them". TPO held that the trustees had erred in finding that there was no interdependency between the member and his widow. This was a finding that no reasonable decision-maker could make in light of all the evidence, especially given that there was an undissolved marriage, a shared mortgage liability and joint responsibility for the care of two children. A finding of fact was made to that extent.

TPO directed the trustees to reconsider their decision taking account of the continued interdependency between the member and his widow. The trustees were ordered to inform the widow of their revised decision and provide supporting evidence of how that decision was reached.

## Comment

These decisions clearly illustrate the importance TPO places on giving reasons as part of the decision-making process, seemingly both as a standalone component in the process and to illustrate compliance with criteria handed down in the *Edge* judgment to exercise scheme powers for their intended purpose, give proper consideration to relevant matters and exclude from consideration those which are irrelevant.

In *Dr G*, TPO commented that “Documented reasons need not themselves be lengthy but should be sufficient to convey to the reader an understanding of the factors which have been given some weight. It may also be appropriate to record why some factors have been discounted. The reasons should be sufficient to enable an aggrieved party to know whether there are grounds to challenge the decision”.

The reality is that TPO has consistently made clear it expects trustees to adapt their processes to ensure these principles are complied with. As such, trustees, when faced with competing claims for the payment of death benefits should ensure they carefully record the factors they take into consideration and clearly demonstrate a causative link between those factors and how they led to the decision ultimately reached. Inevitably, when faced with competing claims for the payment of death benefits, the question of how trustee discretion has been exercised will be under ever greater scrutiny and appropriate record-keeping and process will be vital.

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