

# Discretionary decisions

## Background

Some pension decisions are made at the discretion of the trustees, the scheme's managers or an employer.

Having discretion means, that the body does not have to pay a benefit but can if it wishes to. Or it may mean that a benefit could be paid to one or more people.

Often the scheme's formal documents will use words like "the trustees may decide" or "with the employer's agreement" which show that there is a discretionary power. Typical examples are:

- whether benefits should be paid earlier than the normal retirement age
- if benefits should be reduced
- how death benefits should be distributed

But whether there is discretion about such matters varies from scheme to scheme. So, one scheme might say that if a person meets particular criteria, they automatically get a pension early, but another scheme might say that they only "may" be given a pension in similar circumstances in which case the decision is discretionary.

## The Pensions Ombudsman's approach

The Pensions Ombudsman will look to see if the discretionary powers have been applied in accordance with the rules or regulations governing the scheme and any other relevant Manx legislation.

The Pensions Ombudsman will decide whether a correct process was followed in arriving at the decision. The Pensions Ombudsman does not have to agree with the decision, just decide whether it was arrived at properly.

## What does the Pensions Ombudsman look at?

The Pensions Ombudsman will look at the rules or regulations governing the scheme to see whether the discretion exists, who is supposed to exercise it and in what circumstances.

The Pensions Ombudsman will look at whether the decision maker has considered everything that is relevant (and nothing that isn't) and reached a rational conclusion. That doesn't necessarily mean that the decision maker must decide what's best for the person concerned, though.

For example, employers may be able to take their own interests into account (particularly where there are costs involved) when deciding whether to agree to pay a discretionary benefit subject to complying with their implied duty of good faith owed to employees. In the case of employers (depending on the type of decision) the Pensions Ombudsman will not generally look at the reasonableness of the decision but whether the decision was made properly and is not irrational or perverse.

The Pensions Ombudsman may ask to see all the information that the decision maker had at the time and any records of meetings where the matter was decided, and other details considered in making the decision.

The Pensions Ombudsman will not generally consider information that has only come to light after the decision was made – unless he thinks that the body concerned should have found it out earlier.

### **What happens if the complaint is upheld?**

If the Pensions Ombudsman finds that there was an error in the decision making process, he will usually tell the trustees, employer, manager or administrator that made the original decision to consider the matter again.

The Pensions Ombudsman will tell them to disregard any steps they may have already taken, such as deciding to pay money to another person (and in such circumstances our decision will not affect that person's position).

The Pensions Ombudsman would not usually substitute our own decision for one that has already been made.

### **Is the decision really an exercise of discretion?**

In some cases, it is necessary to consider whether the decision maker is exercising a discretion or making a determination of fact. For example, is the decision being made whether the member factually meets the requirements of the ill-health test instead of whether the decision maker should exercise a discretion to pay an ill-health benefit? It would be a question of fact if the decision maker has to determine having regard to the medical evidence whether a retirement has been caused by ill-health and/or whether the member, as a matter of fact, has the necessary degree of ill-health to qualify for an ill-health pension. In reaching a decision of fact a decision maker must act reasonably and properly. The decision maker must be satisfied that the decision is made rationally both in terms of process and outcome. The evidence should support the facts decided and needs to be one which can properly be reached. If the factual test is satisfied the benefit should be paid.

### **Death benefit cases**

It is quite common for complaints to be made about the payment of death benefits. In many pension schemes lump sum death benefits are held under discretionary trusts so the trustees have discretion as to who to pay the lump sum to within a class of potential beneficiaries (usually including dependants and relatives and any person nominated under an expression of wishes form). There are often disputes where there are complicated family arrangements and the deceased member has both a spouse or former spouse and a new partner with children from both relationships.

In considering whether a decision to pay the lump sum made by the trustees or managers or other decision maker exercising a discretion was validly made the Pensions Ombudsman will typically take the following approach:

- (1) first, the Pensions Ombudsman will check that the decision has been made in accordance with the terms of the relevant death benefit rule (e.g. has the correct person taken the decision and have any conditions for the payment of the benefit under the rule been complied with?). Has the person genuinely made a decision or just followed a death benefit nomination without giving any thought to who should receive the benefit amongst the class of beneficiaries?
- (2) secondly, the Pensions Ombudsman will check that the trustees/managers have taken reasonable steps to identify who potentially falls within the class of beneficiaries under the rules or regulations governing the scheme (this will generally require making appropriate enquiries e.g. obtaining a copy of the will and contacting the personal representatives and close family members)

- (3) thirdly, the Pensions Ombudsman will check whether the trustees/managers have taken reasonable steps to obtain sufficient information about the financial and personal circumstances of the potential beneficiaries to make a decision as to who to pay the money to (this will generally necessitate making enquiries from the potential beneficiaries). If there are complicated family arrangements with multiple partners and children from different relationships the level of enquiry needed may be higher
- (4) fourthly, the Pensions Ombudsman will consider whether there has been a valid decision making process in particular whether:
  - a. the trustees/manager have only considered relevant factors and no irrelevant factors
  - b. the trustees/manager has asked itself the correct questions
  - c. the trustees/manager have made a genuine decision having directed their minds to the issues and
  - d. the trustees/manager have not come to an irrational or perverse decision (i.e. a decision that no reasonable trustees/manager asking the correct questions could have made)

The role of the Pensions Ombudsman again is not to substitute the Ombudsman's own decision for those of the trustees/manager but to ensure that there has been a proper decision making process. Just because the Ombudsman may have come to a different decision it does not follow that the Ombudsman will overturn it. The Ombudsman's role is to ensure that there has been a proper process.

### **Discretionary decisions – Example 1**

Miss C's partner Mr B was employed by a G plc and was a member of the G group pension scheme. Mr B completed a death benefit nomination form in favour of Miss C in April 2009.

Under the scheme rules the employer had discretion to pay the death benefit to "one or more of the Member's Relatives or Dependants". The scheme rules also provided that at the employer's request the trustees could provide a pension to a person who in their opinion was "financially dependent" on an unmarried member with the equivalent of a spouse's pension. Dependant was defined as:

*"..all persons to whose advancement or support the Member shall have contributed in his lifetime and with whom the Member shall have resided and any person to whom the Member shall by notice in writing have requested the Employer to consider as a recipient of any sum payable under the trusts thereof"*

Mr B died without a will on 1 January 2014. The employer decided that the death benefit should be paid to Mr B's father. The evidence obtained was that the decision was reached on the basis that Mr B had never lived with Miss C and although Miss C was named as Mr B's emergency contact his father and brother were named as next of kin.

In March 2014 the pensions manager asked for evidence that Miss C was a dependant saying financial support and proof of residence was required under the rules to pay a benefit. The Trustees refused to consider Miss C's appeal against the death benefit decision under the internal disputes resolution procedure.

Miss C complained that the payment of the death benefit had not been properly considered. She said that Mr B was estranged from his relatives and they had intended to move in together shortly.

The Pensions Ombudsman upheld the complaint. It was for the employer to decide if someone fell within the definition of Dependants or Relatives under the rules.

The decision maker must ask itself the correct questions and direct itself correctly in law by, for example:

- (1) not adopting an incorrect interpretation of the relevant rule
- (2) taking into account all relevant factors and
- (3) not any irrelevant factors and

it must not arrive at a perverse decision (i.e. a decision which no reasonable decision maker, properly advising itself of all the relevant circumstances could reach).

Miss C qualified as a potential beneficiary as she was named in Mr B's nomination form and the employer should have known that, instead they asked for evidence of dependency to establish whether Miss C was a dependant. In so doing the employer and the trustees misinterpreted the rules.

It was correct that the employer needed to make enquiries about Miss C's relationship with Mr B to decide who to pay the death benefits to. The enquiries were however made after the decision to pay the death benefit was made. The trustees should also have considered Miss C's internal disputes resolution appeal. The fact that she was not living with Mr B at the date of death was not an absolute bar on paying her the benefit.

The Pensions Ombudsman directed that the employer should reconsider the distribution of death benefits. The Pensions Ombudsman also directed that a payment for distress and inconvenience should be made for £500.

### **Discretionary decisions – Example 2**

Mr and Mrs E were in the process of divorce. Mr E died before the divorce was finalised, so Mrs E was still married to Mr E at the date of his death.

The rules of the scheme gave the trustees discretion to decide who lump sum death benefits should be paid to and how they should be divided.

Mrs E received a widow's pension in accordance with the scheme rules.

The trustees made some enquiries about Mrs E, but before they had answers they decided not to pay the lump sum death benefit to her but to pay it to someone else.

Mrs E complained that the trustees had not asked her to provide evidence before their decision was taken and said that if they had done so their decision might have been different.

The trustees confirmed that they did not seek further information from Mrs E before making their decision.

They said they had already seen evidence that Mr and Mrs E had agreed a clean break when divorcing.

While there was evidence of Mrs E's financial dependency on Mr E, the payment of a widow's pension to Mrs E was a relevant factor in their deliberations.

Mr E had completed a form nominating Mrs E to receive the lump sum, but this was dated from when they were still together. The trustees said they considered this, but it was for them to decide how much weight (if any) to give to it.

The Pensions Ombudsman found not enough had been done to verify financial information that the trustees had obtained about Mrs E – specifically, the information had not come from her.

The trustees also still did not have responses to some of the enquiries they had made. The Pensions Ombudsman found that the question of whether the trustees' decision had been properly made could not be addressed until the open enquiries were completed.

If the trustees had involved Mrs E in the first instance and asked her for information, answers could have been obtained before the division of benefit was decided.

The Pensions Ombudsman also found that the trustees may not have asked themselves the right questions about the relevance of the widow's pension, which was itself not a discretionary award, but the trustees relied on it to exclude Mrs E from the benefit which was payable at their discretion.

The Pensions Ombudsman told the trustees to make a new decision about whether Mrs E should receive the benefit.