

Ombudsman's Determination

Applicant	Mr S
Scheme	Penguin Random House Pension Scheme (the Scheme)
Respondent	The Trustees of the Penguin Random House Pension Scheme (the Trustees)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by the Trustees.

Complaint summary

2. Mr S' complaint concerns the fact that he was not granted a dependant's pension by the Trustees following the death of his late partner, Miss R.

Background information, including submissions from the parties and timeline of events

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. Miss R was employed by the Random House Group Limited (**the Employer**). She was an active member of the defined contribution section of the Scheme. The Scheme is managed by the Trustees.
5. On 3 June 2019, Miss R died. She left no surviving spouse and had no children.
6. On 1 July 2019, the Employer's HR department (**HR**) emailed Mr S. It said that it was seeking to arrange a telephone conversation with him. It had received some questions from the Trustees that it wanted to ask him. It confirmed that the Trustees were considering whether any additional support could be given to him in relation to the lease on the flat that he had been sharing with Miss R.
7. On 3 July 2019, the telephone conversation took place between Mr S and HR.
8. On 8 July 2019, HR sent Mr S an email. It said that the Trustees had made a decision to pay the lump sum death benefit to Miss R's sister. This was consistent with the expression of wish (**EOW**) form that Miss R had completed.

9. On the same day, Mr S emailed the Pensions Manager (**PM**). He maintained he had been led to believe that he would be eligible for a pension or a lump sum from the Scheme. He asked for a copy of the Scheme's rules (**the Rules**).
10. On 9 July 2019, the PM emailed Mr S. The email stated:
 - that he apologised if Mr S had been led to believe that he would be eligible for benefits from the Scheme;
 - HR's request for information was not intended to imply any entitlement;
 - where there was no surviving spouse, the Trustees had discretion to decide whether to pay a pension to someone who they believed was in a relationship tantamount to marriage or civil partnership or had been dependent on the deceased for maintenance or support; and
 - the information that the Trustees had received did not indicate that Mr S qualified for a pension benefit as a financial dependant.
11. On the same day, Mr S emailed the PM. He asked for a copy of the Rules, Miss R's EOW form and the information that the Trustees held about him. He also asked for a copy of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). He said that the absence of Miss R's contribution to costs and rent was putting considerable strain on his finances.
12. On the same day, the PM emailed Mr S. He confirmed the information that the Trustees held relating to Mr S and provided him with a copy of the IDRP. In the email he stated:
 - that he was only able to provide a copy of the Rules to certain categories of people, and Mr S did not fit into any of those categories; and
 - Miss R's EOW form was confidential and could not be shared with Mr S. However, he confirmed that the lump sum death benefit had been paid in accordance with her wishes.
13. On 11 July 2019, Mr S emailed the PM and asked him to reconsider the decision not to provide him with a copy of the Rules.
14. On the same day, the PM emailed Mr S. He said he was unable to provide Mr S with a full copy of the Rules as Mr S was not a member or a beneficiary of the Scheme. However, he provided extracts from the Rules that were relevant to Mr S.
15. On 23 July 2019, Mr S emailed the PM. He said that:
 - the PM's email of 9 July 2019 did not mention "financially interdependent" as specified in the Rules. So, the correct definition had not been applied when considering his eligibility for a pension;

- he and Miss R had paid equal shares of the rent on their flat and had also shared the payment of utility bills and other expenses;
- without Miss R's contribution, the rent on the flat amounted to more than 67% of his net salary;
- the evidence he would provide showed beyond doubt that he and Miss R were financially interdependent; and
- as far as he was aware, nobody else was financially interdependent with Miss R. Nor was she providing maintenance or support to anyone else.

16. On 26 July 2019, the PM wrote to Mr S. He said:-

- When making their decision, the Trustees took into account information from Miss R's family and the information that Mr S had provided to HR concerning his relationship with Miss R.
- The information provided indicated that Mr S was Miss R's boyfriend and they had been living together. They had signed a two-year rental agreement on their flat which had a break clause at the end of 2019. They each contributed half of the rent.
- Where there was no surviving spouse or child, the Trustees had absolute discretion to pay a pension to a financial dependant.
- A financial dependant was defined in the Rules as "any person who in the opinion of the Trustees has been dependant on the Member for maintenance or support or financially interdependent with him ...".
- The Trustees decided that the circumstances surrounding Mr S' relationship with Miss R did not warrant the payment of a pension to him.
- The Trustees had sought legal advice to confirm the process they followed in exercising their discretion was appropriate and complied with the Rules.

17. On 10, 11 and 20 August 2019, Mr S sent emails to the PM. He provided further information and completed an IDR application form. In these emails he:

- provided financial information to support the comments he had made in his email of 23 July 2019. The information included copies of his P60, a payslip, bank statements and his tenancy agreement;
- said the Trustees were exercising their discretion for the purpose of enabling the Employer to benefit from the insured lump sum which was available to provide a pension for a financial dependant of Miss R;
- said it was clear that he was financially interdependent on Miss R and fell within the definition of financial dependant;

- said the legal advice the Trustees had received was incorrect; and
 - provided a copy of his eulogy from Miss R's funeral and two personal cards from Miss R. He said that he began living with Miss R in June 2018, before moving to Hampstead in December 2018.
18. On 25 September 2019, the Trustees provided their response under the stage one of the IDRPs. They said:-
- The lump sum death benefit had been paid in accordance with Miss R's EOW form.
 - They had decided that Mr S did not meet the definition of a financial dependant. Having reviewed all the evidence, they continued to believe that Mr S' circumstances did not qualify him as a financial dependant of Miss R.
 - Both Mr S and Miss R were jointly responsible for payment of the rent under the tenancy agreement. Section 10.2 of that agreement gave them the right to terminate the agreement on 21 December 2019 by giving two months' notice.
 - Mr S might have become solely responsible for the payment of the rent for a six-month period until the break clause took effect. They did not consider that this resulted in him becoming a financial dependant who was entitled to a pension for life from the Scheme.
 - The Rules gave them absolute discretion on whether any person qualified as a financial dependant.
 - If Mr S was unhappy with their decision, he had up to six months to appeal against it.

Summary of Mr S' position

19. Mr S said:-
- Death benefits for active members of the Scheme were insured through an insurance company. The survivor's pension was insured by a lump sum in the region of eight times the deceased's pensionable salary. The Trustees had received a payment in the region of 12 times Miss R's pensionable salary from the insurance company.
 - The employer contributions paid in respect of Miss R had reverted back to the Employer as a result of her death.
 - Miss R and he had each paid half of the rent on their flat on which they had taken out a joint tenancy. The rent was two-thirds of his income, so he could not have afforded it alone without a reduction in his standard of living.

- He was the only person eligible to be considered for a dependant's pension following the death of Miss R. He was in the category of financial dependant by virtue of their financial interdependency.
 - The Trustees had decided not to pay a dependant's pension when he was eligible for such a pension. In doing so, the Trustees had exercised their powers for the improper purpose of financially benefiting the Employer. In addition, they had not taken account of all the relevant facts. The enquiries that they made did not seek information from him as to the extent of his financial interdependency with Miss R.
 - The Employer appointed trustees had a conflict of interest which should have debarred them from being involved in making the decision not to award him a pension.
 - The Employer profited from Miss R's death, a situation that amounted to unjust enrichment or receiving money in breach of trust.
 - The Trustees misdirected themselves when considering whether he and Miss R were financially interdependent by looking at the scope for terminating the tenancy agreement on their flat. The Trustees did not address the reduction in his living standards.
 - In the PM's email of 9 July 2019, the definition of financial dependant that had been quoted omitted reference to financial interdependence. This could possibly be considered as amounting to maladministration leading to injustice.
 - The decision made by the Trustees would not have been reached by any other reasonable trustee board.
 - In the letter from the PM dated 25 September 2019, it was not clear to whom he could have appealed.
20. The Trustees said that they had reconsidered Mr S' eligibility for a pension as part of their IDRPs investigations. The decision had been agreed during a Trustees' meeting on 18 September 2019. The information that they had taken into account included:
- Miss R's EOW form;
 - information provided by Miss R's family;
 - information provided by HR following a conversation with Mr S on 3 July 2019; and
 - information provided by Mr S including his emails of 9, 11 and 23 July, 10, 11 and 20 August and 5 September 2019.

Adjudicator's Opinion

21. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised below:-

- The role of the Pensions Ombudsman is to consider whether the procedure that the Trustees followed in exercising their discretion was reasonable. There are some well-established principles which decision makers are expected to follow in exercising their discretion. Briefly, they must take into account all relevant matters and no irrelevant ones. They must not make a perverse decision, that is a decision which no reasonable decision makers, properly directing themselves, could arrive at in the circumstances.
- If the Pensions Ombudsman is not satisfied that the decision has been taken properly, he can ask the decision makers to look at the matter again. However, the Pensions Ombudsman will not usually replace the decision with a decision of his own or say what the subsequent decision should be.
- The Trustees' role is to administer the Scheme in accordance with the Rules. Extracts from the Rules can be found in Appendix 1. The Rules give the Trustees full discretion to determine if, following a member's death, an individual meets the criteria for a dependant's pension to be paid.
- In this case, the Trustees did not consider that Mr S was entitled to a dependant's pension. They confirmed that they had based their decision on the fact that the evidence did not show that Mr S was adequately financially interdependent with Miss R.
- The Adjudicator reviewed the rule pertaining to the payment of a dependant's pension and read the definition of a financial dependant. He was of the opinion that the Trustees acted in accordance with the Rules.
- The Adjudicator considered the initial decision that was made in July 2019 to not award Mr S a dependant's pension. He took the view that, in making this decision, all the information available at the time had been considered.
- In the Adjudicator's opinion, Mr S then had adequate opportunity to provide additional evidence of his relationship and financial affairs with Miss R. This he chose to do. In the Adjudicator's view, this additional evidence, together with the original evidence, was considered when the Trustees reviewed Mr S' request for a dependant's pension as part of their IDRPs deliberations. The Adjudicator did not agree that their decision was perverse, given the evidence that was available to them.
- Mr S referred to the PM's email of 9 July 2019, which mentioned the criteria the Trustees had to take into account when considering whether to pay a dependant's pension. He said that "financial interdependence" had not been mentioned as

specified in the Rules. He suggested that this indicated that the Trustees had not applied the correct definition when deciding not to award him a pension.

- The Adjudicator noted that, in a subsequent letter of 26 July 2019, the PM confirmed the criteria that the Trustees had used in making their decision. This included mention of “financially interdependent”. The Adjudicator was not persuaded that the contents of the email of 9 July 2019 suggested that the Trustees applied an incorrect definition when making their decision.
- Mr S made reference to the way in which death benefits in the Scheme were insured. He suggested that, in exercising their discretion in the way that they did, the Trustees had financially benefited the Employer. He also suggested that, due to this, the Employer appointed Trustees had a conflict of interest.
- The Adjudicator noted that it is a common feature of pension schemes that death benefits for active members are insured. In addition, he said that it is common for employer nominated representatives to be trustees. In the case of Mr S, it was the Trustees’ responsibility to consider his eligibility for a dependant’s pension based on the Rules and taking into account the evidence available. The Adjudicator was of the view that how the death benefits were funded within the Scheme was irrelevant to their deliberations. The Adjudicator found no evidence that the Trustees took into account any factors which they should not have done.
- In the Adjudicator’s opinion, the Ombudsman would not direct the Trustees to reconsider their decision concerning Mr S’ application for a dependant’s pension.
- Mr S said that the IDRPs response sent to him on 25 September 2019 did not make it clear to whom he could have appealed. In the Adjudicator’s view, the letter did confirm that he could appeal, and it detailed the timescale within which any appeal had to be raised. No more details of the appeal process were provided in that letter. However, Mr S had the option of responding to the letter to seek further guidance and confirm that he wished to appeal, should he have so wished.

22. Mr S did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider.

23. Mr S provided his further comments which do not change the outcome. He said:-

- The Adjudicator had failed to distinguish between defined benefit and defined contribution arrangements. Under the defined contribution section of the Scheme, of which Miss R was a member, the Employer paid contributions as a fixed percentage of pay together with the insurance costs to cover the risk benefits. In the event of a member’s death, in addition to the lump sum death benefit, a surviving spouse’s pension was payable. If there was no surviving spouse, then a pension not exceeding the amount of the spouse’s pension was payable to a financial dependant at the Trustees’ absolute discretion.

- In the case of Miss R, an insured lump sum of approximately £336,000 was in place to cover the provision of a pension to a financial dependant. As he was a financial dependant, the Trustees should have exercised their powers to use this to grant him a pension.
- He would like to receive confirmation of the insurance arrangements for the Scheme and how much was received from the insurers following Miss R's death.
- A majority of the Trustees were appointed by the Employer. When making a decision that may benefit the Employer, there is a burden of proof on them to demonstrate that they were exercising their powers correctly. Even if conflicts were recorded in a register, the more acute the conflict, the greater the burden of proof. Just because this was a common feature of many schemes, it did not mean that the applicable legal rules on conflicts of interest did not apply.
- No reference had been made in the Opinion to the Rules, and whether they were able to act in the event of a conflict of interest.
- The Trustees are required to exercise their discretion for a proper purpose. Their decision to exercise their discretion to benefit the Employer rather than him suggested that their decision was improper and perverse. There was a transfer of risk to the member in the defined contribution section of the Scheme in return for certainty of cost for the Employer. This distinguished his position from the position in a defined benefit scheme where the employer paid for any deficit and benefitted from any surplus.
- The Adjudicator's statement of the role of the Ombudsman omitted mention of the proper purpose requirement.
- Based on the evidence that he had submitted, the Trustees' decision not to award him a dependant's pension was perverse and one that no other trustee body acting reasonably would reach. The Trustees had not acted in accordance with the Rules.
- The Civil Service Pension Scheme guide to pensions for partners defined "financially interdependent" as: "that you rely on your joint finances to support your standard of living. It doesn't mean that you need to be contributing equally". In addition, the Armed Forces Pension Scheme joint service manual stated the following in respect of one type of evidence that could help support a claim of financial interdependence:

"A lease or rental agreement relating to a dwelling where the scheme member and the partner lived under which both the scheme member and the partner were liable to pay rent."
- In the definition of "dependant" in the glossary to Her Majesty's Revenue and Customs' pensions tax manual, one of the criteria mentioned is, if in the opinion of the scheme administrator:

“the person’s financial relationship with the member was one of mutual dependence (the scheme rules will set out the criteria the scheme will use to determine mutual dependency)”.

- He is within the definition of “dependant” set out in paragraph 15 of Schedule 28 to the Finance Act 2004. An extract from this document can be found in Appendix 2.

24. I note the additional points raised by Mr S, but I agree with the Adjudicator’s Opinion.

Ombudsman’s decision

25. Mr S’ complaint concerns the decision made by the Trustees not to award him a dependant’s pension following the death of Miss R.
26. Trustees of defined benefit and defined contribution schemes have a responsibility to pay benefits in accordance with the scheme rules. When making this decision, they should not be considering how those benefits are funded. Which benefits are or are not insured is irrelevant to their deliberations, as is the amount of any payment that may be available from the insurers.
27. The decision that the Trustees had to make in this instance was whether Mr S was entitled to a benefit from the Scheme based on the Rules of the Scheme. Whether any insurance payment that was potentially available should be paid to the Employer or be used to provide a benefit for Mr S was not relevant.
28. For these reasons, I do not consider that the insurance arrangements that are in force for the Scheme and the amount of any insurance payment available following the death of Miss R are relevant. So, I have not requested this information from the Trustees.
29. Furthermore, the fact that Miss R was a member of the defined contribution section of the Scheme was only relevant from the point of view of ensuring that the correct section of the Rules was used when determining any benefits payable. The fact that, in general, there is a transfer of risk to members in defined contribution schemes in return for certainty of cost for employers did not have any relevance to the Trustees’ decision.
30. Mr S has expressed concerns in relation to conflicts of interest that may have existed when the Trustees made their decision not to award him a dependant’s pension, particularly amongst the Employer nominated Trustees. Section 67.1 of the Rules states that:
- “No decision or exercise of discretion by the Trustees shall be invalidated on the grounds that a Trustee (or any director of a corporate Trustee) had any conflict of duty or interest in such decision or exercise of discretion.”

31. Furthermore, guidance for trustees issued by The Pensions Regulator highlights the need for trustees to act prudently, responsibly and honestly. The guidance states:

“When you are acting as a trustee your duties are to the scheme. Regardless of any other position you may hold, your duty must not be to any group or individual that you are connected with, such as the employer or a trade union, or a particular group of members such as pensioner members.”
32. It is inevitable that conflicts of interest will exist. However, it is the responsibility of all trustees to follow this guidance. I have considered whether the Trustees’ decision had been made for the proper purpose as referred to by Mr S. I have seen no evidence that the Trustees considered benefiting the Employer when exercising their discretion.
33. I have noted the additional information that Mr S has provided from a number of sources in relation to the definition of dependant and financial interdependency. However, it is the Rules that the Trustees had to follow when making their decision on whether to pay Mr S a dependant’s pension, not other scheme rules. Under the Rules, the term “financially interdependent” is not defined, so the usual dictionary definition would apply.
34. My role is not to say whether I agree or disagree with the decision made by the Trustees when they exercised their discretion in deciding that Mr S should not be paid a dependant’s pension from the Scheme. It is my role to consider whether the procedure that the Trustees followed in coming to their decision was reasonable having properly considered the evidence.
35. A perverse decision is taken to mean a decision that no reasonable decision maker, properly directing itself, could arrive at in the circumstances. On the facts, the Trustees could have made a different decision, but I am satisfied that the one which they made fell within the bounds of what was reasonable. I do not consider that the decision was perverse in that sense.
36. I am satisfied that the Trustees took into consideration all relevant matters and no irrelevant ones. Furthermore, they asked the correct questions and correctly followed the Rules. I do not agree that their decision was perverse. For these reasons, I do not find it necessary to ask the Trustees to reconsider their decision.
37. I do not uphold Mr S’ complaint.

Anthony Arter

Pensions Ombudsman
28 February 2022

Appendix 1

Extracts from the Rules of the Random House Pension Scheme dated 7 June 2010

“Pensions for Dependants

[...]

23.5 If a Member dies leaving no surviving Spouse or Pensionable Children (or the pension to any Pensionable Children stops) the Trustees may in their absolute discretion pay to one or more Financial Dependants a pension of an amount not exceeding the amount of the Spouse’s pension which would otherwise have been payable.”

“Appendix 1

Definitions

[...]

“Financial Dependant” means in relation to a Member or Ex-Spouse Member, any person who in the opinion of the Trustees has been dependant on the Member for maintenance or support or financially interdependent with him. The class of Financial Dependants shall be closed at the date of death of the Member or Ex-Spouse Member except that it shall include persons then conceived but not yet born who if they had then been born would have been Financial Dependants. Provided that a person may only be categorised as a Financial Dependant if he satisfies the definition of “dependant” set out in paragraph 15 of Schedule 28 to the FA04.”

Appendix 2

Extract from paragraph 15 of Schedule 28 to the Finance Act 2004

“Meaning of “dependant”

[...]

- (3) A person who was not married to, or a civil partner of, the member at the date of the member’s death and is not a child of the member is a dependant of the member if, in the opinion of the scheme administrator, at the date of the member’s death -
- (a) the person was financially dependant on the member,
 - (b) the person’s financial relationship with the member was one of mutual dependence, or
 - (c) the person was dependant on the member because of physical or mental impairment.”