

Ombudsman's Determination

Applicant	Mr T
Scheme	Bennett Pension Trust Family Suntrust Scheme (the Scheme)
Respondent	AXA Wealth (AXA)

Outcome

1. I do not uphold Mr T's complaint and no further action is required by AXA.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr T's complaint about AXA, the administrator, is that they have refused to allow a 'dependant's flexi-access drawdown' following the death of his wife in March 2015.

Background information, including submissions from the parties

4. In May 2012, both Mr and Mrs T set up the Scheme with AXA.
5. Section 6 of the application form Mrs T completed when the Scheme was set up states: "Your share of the Pooled Fund will normally be paid as a lump sum (see 6.1 and 6.2)". Section 6.1 of the application form states:

"By filling this in you can let the Scheme Administrator know how you want any lump sum benefits that become payable on your death, before payment of benefits, to be dealt with. If you are unsure of any points, please discuss these with the Financial Adviser.

The lump sum benefits can be dealt with at the Scheme Administrator's discretion, taking into account your wishes, or it can be paid under an individual trust set up by you. By having the payment made to a trust:

- you can arrange for the benefits to go to the people you want to receive them; and
- the Scheme Administrator will make payment automatically to the individual trust so it will speed up the payment of the benefits.

...

If you do not set up an individual trust the Scheme Administrator will decide how any lump sum benefits should be distributed amongst your dependants or any other beneficiaries that the scheme rules allow...”.

6. Relevant extracts from the Terms and Conditions of the Scheme, in relation to the payment of lump sum death benefits, are set out in the Appendix.
7. In August 2012 both Mr and Mrs T established a discretionary trust (the **Trust**), under which, in the event of one of them dying, the lump sum death benefit is held in trust by the survivor plus any ‘Additional Trustee’, for the benefit of one or more persons named or specified in the classes as set out in the deed. The classes included their spouses, children, siblings, any person who has an interest in their estate and any person nominated by them. The trustees of the Trust (the **Trustees**) are Mr and Mrs T and Mrs T’s sister.
8. In January 2015, Lumin Wealth (**Lumin**), Mr and Mrs T’s independent financial adviser, telephoned AXA informing them that Mrs T was diagnosed as terminally ill and it wanted to know whether there were any provisions under the Scheme that covered this. Lumin were informed by AXA that a member of AXA’s technical team would ring them back. Lumin later said that no one rang them back.
9. Mrs T died in March 2015. On 17 March 2015, Lumin telephoned AXA to inform them that Mrs T had passed away. Lumin added that the new pension regulations that were coming out in the next tax year (i.e. from 6 April 2015) allowed for a dependant’s drawdown, and therefore a decision would need to be made whether a lump sum or a dependant’s drawdown was payable on Mrs T’s death. AXA said that no one was available from their technical team to discuss the matter, but someone would ring Lumin back.
10. In an email dated 18 March 2015, AXA told Lumin: “...post April if a member dies under age 75, any beneficiary can take this to Flexi-access Drawdown and the income will be payable tax free...”.
11. In an email on 19 March 2015, AXA informed Lumin that they had reviewed the file and it was clear that they would need to settle the death benefit as a lump sum to the Trust. As Mrs T had a fund of £1.9 million, there may be tax implications. This is a 55% tax charge on the value above the Lifetime Allowance.
12. New rules for flexi-access drawdown funds became available to members of defined contribution pension arrangements from 6 April 2015.
13. There was a further exchange of emails and correspondence between AXA and Lumin through March to April 2015. Lumin informed AXA that it had discussed the matter concerning the death benefits for Mrs T with the Trustees, and the Trustees’ intention was to pay 100% of the death benefit to Mr T as Mrs T had left her entire estate to him in her will. Lumin added that the Trustees were willing to give AXA an undertaking revoking any claim to the lump sum.

14. AXA responded to Lumin saying that, after looking at the documents completed by Mrs T, the Terms and Conditions and the rules of the Scheme (the **Rules**), they were not able to use their discretion to go against the way in which Mrs T had requested that the death benefit should be paid. The Rules and the Terms and Conditions clearly removed their discretion when a trust is linked to a policy.
15. Lumin on behalf of Mr T made a complaint to AXA. AXA wrote to Lumin in June 2015, apologising for providing incorrect information in March 2015 about the potential to take a dependant's drawdown. They said that as the Trust had been set up when the Scheme started, this forms a promise by them to make the payment to the Trust and therefore they cannot offer a settlement based on a discretionary decision. They offered compensation of £300 to Mr T for the worry and concern caused as a consequence of the incorrect information they had provided.
16. As the matter could not be resolved, Mr T brought his complaint to us.
17. Lumin's comments, on behalf of Mr T, are set out below.
 - It is partly correct that during the telephone conversation in January 2015 that information was requested with regard to the 'terminal illness' part of the policy. However, it was also stated that it wished to discuss Mrs T's situation, with AXA's technical team, to "explore those options, whilst she is still around" so that "she might be able to sort her affairs out". This was a clear indication that Mrs T was reviewing her situation whilst she was still alive and also a clear request that death benefit options were being considered.
 - It is clear from the March 2015 telephone conversation that AXA's technical team had not made contact and it was in that time frame that Mrs T passed away, which meant that the option was not discussed.
 - AXA maintain a stance that it is the adviser's duty to provide information to the client on this matter. As the adviser, it was never given the correct information and it was left in the knowledge that the existing scheme structure was capable of dealing with the new legislation.
18. AXA's comments are set out below.
 - When the Scheme was set up in July 2012, it was possible for Mrs T at any time from then on to have made an allocation that would have guaranteed that they paid benefits to an eligible dependant (i.e. Mr T). There was no need to change the scheme rules to allow this to happen. If this option had been selected, Mr T would have been able to choose whether to receive a lump sum or an income. However, the option selected by Mrs T was for the lump sum to be paid to the Trust.
 - Under the Scheme documentation, an allocation in favour of an eligible dependant takes precedence over a trust which means that Mrs T could have given them

instructions at any time prior to her death that payment was to go to Mr T rather than to the Trust.

- It is only in circumstances where a member has made no allocation nor established a trust that they, as scheme administrators, could exercise their discretionary powers to determine to whom and in what format the death benefits should be paid.
- It is regrettable that they did not immediately identify the existence of the Trust when they spoke to Lumin in March 2015. However, even if they had done so, this would not have permitted them to now offer a dependant's drawdown for Mr T.
- The telephone conversation with Lumin in January 2015 was only related to Mrs T accessing her funds due to ill health.
- The conversation with Lumin, where they initially gave incorrect information with regard to paying benefits as a dependant's drawdown, did not take place until after Mrs T had sadly passed away in March 2015. Unfortunately, at that point they did not immediately identify the existence of the Trust and the information they gave regarding potential access to a dependant's drawdown for Mr T did not reflect the true position.
- They corrected the information on 20 March 2015, once they had identified from their records that Mrs T had established the Trust into which a lump sum had to be paid.

Adjudicator's Opinion

19. Mr T's complaint was considered by one of our Adjudicators who concluded that no further action was required by AXA. The Adjudicator's findings are summarised briefly below.
- Section 27 of the Terms and Conditions of the Scheme, and section 6 of the application form Mrs T had completed when the Scheme was established, both state that if an individual trust has been set up by the member, then AXA have to pay the lump sum death benefit to the trustees of that trust. Mrs T, together with Mr T, had set up the Trust, so AXA has no discretion and have to pay the lump sum to the Trust.
 - The only way AXA could have exercised a discretion was if Mrs T had instructed them before she died, to allow Mr T access to a dependant's drawdown thereby bypassing the Trust. Therefore, the question is whether or not Mrs T had instructed AXA, before she died, that she wanted to allow Mr T access to a dependant's drawdown.

- The recordings of the January 2015 telephone conversation between AXA and Lumin were listened to and the conversation was about provisions under the Scheme for the payment of benefits on the grounds of terminal ill health.
 - AXA say that they had given Lumin incorrect information when the latter contacted them in March 2015. There is nothing in the recording of the March 2015 conversation which suggest that AXA may have provided incorrect information to Lumin. It is possible that AXA may have in a separate telephone conversation, in March 2015, with Lumin provided incorrect information, but no evidence has been provided. However even if there was evidence that AXA had provide incorrect information in March 2015, this would have been after Mrs T had died.
 - Lumin admits that the conversation in January 2015 was a request for information about the terminal illness part of the policy, but says that it had also told AXA that Mrs T wished to explore those options while she was still around so that she might be able to sort her affairs out. Whilst Mrs T may have been exploring her options, based on what was said during the conversation, it is not reasonable to say that AXA could and should have taken this as an instruction from Mrs T that she wanted to allow Mr T a dependant's drawdown in the event of her death.
 - It is not disputed that AXA's technical team did not contact Lumin following the January 2015 telephone call. However, Lumin could have contacted AXA soon after their January 2015 telephone call and before Mrs T died March 2015, when no one from AXA had contacted it, but Lumin did not.
20. Mr T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr T provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr T for completeness.

Ombudsman's decision

21. Lumin's comments, on behalf of Mr T, on the Adjudicator's Opinion are set out below.
- AXA did not immediately identify the existence of the Trust in March 2015. They should have identified the existence of the Trust in January 2015.
 - As no alternative information was received from AXA, Mr T relied on how AXA operated the Scheme. It was believed that the Scheme was fit for purpose and able to take advantage of the new legislation, which was not an unfair assumption to make. While information provided by AXA may not be 'incorrect information', the lack of new correct information as to how policies in trust would be treated under the new legislation is very important and, if received, would have been acted upon.

- At no point did any AXA representative imply or mention that by the policy being in trust it would not be allowed to benefit from the new rules in April 2015.
 - There was no need for Mrs T to make any instructions before she died.
 - It made further calls to AXA requesting technical support between January and March 2015. The information it requested was still outstanding when it called AXA in March 2015. AXA has provided no information about 'terminal illness' benefits; if this information had been received, the existence of the trust and its implications would have been made clear.
 - Section 34 of the Terms and Conditions states that AXA can amend any provision under certain circumstances provided there is no detrimental effect to the policyholder. It does not say "set aside any provision EXCEPT section 27 and all death benefit clauses". As AXA are not willing to set aside section 27 and subsections, they are detrimentally affecting the policyholder.
 - Section 34.1.1 states clearly that the administrator can amend the rules of the scheme and therefore take advantage of any legislation changes. In the 2014 Autumn statement, new 'pension freedom' rules were announced to be introduced in April 2015. As death benefit claims under HMRC rules are allowed for two years from date of death, any death of an AXA policyholder would be detrimentally affected if AXA do not amend the rules of the scheme as it says they can do under section 34.
22. I have carefully considered the above points made by Lumin. It is quite clear from sections 25 and 27.1.1 of the Terms and Conditions, and the application form Mrs T completed when the Scheme was set up, that in the event of her death, where there were no prior instructions for allocation of the fund, a lump sum death benefit would be paid to the Trust set up in 2012. I cannot see any reason to consider AXA's interpretation of the scheme rules unreasonable or to disagree with their conclusion that they have no discretion in the matter – they must pay the lump sum death benefit to the Trust.
23. I agree that new rules for flexi-access drawdown funds became available as from 6 April 2015, but Mrs T died before these new rules came into effect. If Mrs T did want to allow Mr T a dependant's drawdown, then she would have had to instruct AXA of this before she died and there was no such instruction.
24. Under section 34 of the Terms and Conditions, AXA does have the right to amend the provisions of the Scheme to take account of changes which include changes in legislation and regulation. However, there is nothing in the Terms and Conditions or the rules of the Scheme which state that these amendments can or have to be made retrospectively.

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25. Therefore, I do not uphold Mr T's complaint.

Karen Johnston

Deputy Pensions Ombudsman

21 February 2017

Appendix

“25. BENEFITS FOLLOWING DEATH

- 25.1 If you die any remaining individual benefit fund will be applied in the following order:
- 25.1.1 first allocated to provide a benefit in accordance with section 26 for any eligible dependents that you specify in prior instructions; and
- 25.1.2 second, to the extent that no specified eligible dependent survives you or you do not provide prior instructions for allocation, paid in accordance with section 27.”

“27. LUMP SUM DEATH BENEFITS

- 27.1 On your death any part of an individual benefit fund or relevant scheme pension fund share to be applied in accordance with this section 27 shall be paid as follows:
- 27.1.1 first, where you have established an individual trust in respect of a lump sum that would be payable under the scheme, we will pay the lump sum to the trustees of that trust...
- 27.1.2 second, where no such trust has been established, we may at our absolute discretion pay a lump sum to one or more lump sum beneficiaries (as defined in the rules)...

...

34. VARIATIONS TO THE TERMS AND CONDITIONS

- 34.1 **We** reserve the right to amend, set aside or supplement any provision of these **terms and conditions** in the following circumstances:
- 34.1.1 if there are changes in applicable pensions, tax or other relevant legislation, regulations or industry codes of practice which affect the **scheme**;

...

We can exercise this right upon giving **you** 30 days written notice, so far as it is practicable to do so. Any written notice will be sent to **your** last address that **we** hold. The proposed changes will take effect from the date stated in the written notice. During the notice period, if **you** are unhappy with the proposed changes, **you** should notify **us** and **you** will be able to transfer **your** benefits to another **registered pension scheme**.”