

Ombudsman's Determination

Applicant	Ms D
Scheme	Kier Group Pension Scheme (the Scheme)
Respondent	The Trustees of the Kier Group Pension Scheme (the Trustees)

Outcome

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

Complaint summary

3. Ms D has complained that the Trustees have not correctly considered the apportionment of Mr E's death in service lump sum (**the lump sum**). Ms D feels that the Trustees have not put enough weight upon her dependency on Mr E, her relationship with Mr E, the nomination form, or her ill health.
4. Ms D feels that she has been discriminated against because she and Mr E were not married, and believes that if they had been she would have received 100% of the lump sum.
5. She believes that Mr E's three children are entitled to something, but that 50% of the lump sum split equally between them is too high and that awarding 80% to her and 20% split equally between the children would have been more appropriate. Ms D has also questioned whether the adult children should qualify as beneficiaries as they are no longer legally children.

Background information, including submissions from the parties

6. Mr E was an active member of the Scheme. In the event of death before normal retirement age, one or more of the member's beneficiaries, on apportionment by the Trustees at their absolute discretion, are entitled to the lump sum, which is calculated as four times salary plus a refund of the members' contributions to the Scheme. Mr E passed away on 26 February 2015.
7. Capita, the Scheme administrators, contacted potential beneficiaries of the lump sum. The Rules outline the death in service benefits and the definition of "Beneficiary".

8. Ms D was Mr E's partner at the time of his death and had been for approximately 30 years. Ms D satisfies the definition of beneficiary on two grounds, the first is definition (e) in that she was financially interdependent on Mr E, the second definition being (f) that Mr E nominated her on an expression of wish form he completed in January 2015. Ms D was contacted by Capita and supplied evidence to show that she and Mr E were partners, that they were living together and that she was financially dependent upon him.
9. Mr E's three adult children from his former marriage, two sons and a daughter, were also contacted by Capita as potential beneficiaries. The Trustees say that the children also satisfy the definition of beneficiary on two grounds. One being (g) that they were named in Mr E's Will, the other being (c) "any issue of the Member and their spouses". Issue being defined in Law by the Oxford Dictionary as "children of one's own."
10. Mr E also had a Will, in which he left the residue of his estate, after paying any debts, inheritance tax and executorship expenses, to his three children. The Will was written in 1992 when Mr E owned a property which he later sold in 2002 for market value to his former wife, Mrs E, the mother of the three adult children.
11. On 22 April 2015, Ms D's representative informed Capita that Mr E had given his main asset, the property, to his children a number of years previously. Capita made enquiries to establish if this was the case and contacted Mrs E for confirmation. Mrs E confirmed that Mr E had sold the house to her in 2002, for the full market value, and that it was not owned by any of the children. She also confirmed that she was currently living there with Mr E's daughter, Mrs H, the daughter's husband, Mr H, and their children, her grandchildren. In 2009 Mr H had been added to the mortgage and an extension to the house was undertaken to create more living space which was completed in 2012.
12. The Trustees considered the evidence that they had received and informed the beneficiaries of their decision on 2 December 2015. The Trustees used their discretion to split the lump sum awarding 50% to Ms D and 50% split equally between the three adult children. In addition, while Mr E and Ms D were not married, the Trustees used their discretion to award Ms D a dependants' pension of equal value to the available spouses' pension.
13. Ms D complained that the decision had not been made correctly and the complaint was considered under the Schemes two stage Internal Dispute Resolution Procedure (**IDRP**). There were three main points of contention concerning; (i) the property and whether Mrs H owned a portion of it; (ii) the Will, in that Ms D says that Mr E intended her to have the benefits from his pension and the children to have the estate; and (iii) Ms D's financial interdependency, and whether this had been given enough weight by the Trustees when making their decision.
14. The Trustees did not uphold Ms D's complaint at either stage of IDRP. The Trustees maintain that the property is not relevant as Mr E sold it in 2002. They considered

that Mrs H may have an indirect interest in it by virtue of her husband entering into the mortgage, however this was not as a result of Mr E's actions. The Trustees considered the matter no more relevant than had Mrs E and Mr H jointly acquired a different property from a different party. The Trustees also confirmed that anyone named in a Will is a beneficiary under the Scheme Rules, and that the Will shows Mr E's intention to leave his children something. However, there was a shortfall in the estate and the children would receive nothing. The Trustees considered it reasonable to award the children a percentage of the lump sum. Finally the Trustees commented on their consideration of Ms D's financial interdependency on Mr E. They have confirmed that the Rules do not require more weight to be placed on one definition of beneficiary over another, and therefore equal weight was given to each. The Trustees were satisfied that financial interdependency was properly considered.

Adjudicator's Opinion

15. Ms D'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 briefly below:-

- The Scheme Rules are clear that death in service benefits are payable by the Trustees to beneficiaries in the proportions determined by "the Trustees in their absolute discretion". When the Pensions Ombudsman or his Office look at complaints of this nature it is not for the Ombudsman or his Office to replace the decision made by the Trustees. The Ombudsman will look at whether the decision has been made in line with the correct Scheme Rules and overriding legislation, ensuring that all relevant evidence and no irrelevant evidence has been taken into account, and that the decision reached is not perverse, in that it would not reasonably be made by any other decision maker presented with the same evidence. In the event that the Ombudsman decides that the decision has not been made in the correct manner he will explain why and direct that the decision be made afresh by the decision maker. If the Ombudsman finds that the correct procedures have been followed, even where he may not agree with the outcome, no directions will be made.
- The Rules have a number of definitions that enable persons to qualify as a beneficiary under the Scheme. Both Ms D and the adult children qualify under two of these definitions. Ms D has raised concern over whether the adult children should qualify under definition (c), "any issue of the Member and their spouses". She has said that "issue" means children and the legal definition of a child is a person under the age of 18 and dependent upon the parent. The adult children do not meet this definition, so she feels that they should not qualify for this reason. The Adjudicator felt this to be immaterial given that the adult children are also beneficiaries under the Will and, as such, qualify as beneficiaries of the Scheme under the Scheme Rules, therefore the adult children still qualify as beneficiaries. Similarly, the Rules do not give more weight to one definition over another. It is for

the Trustees to exercise their discretion to decide how the death in service benefits are to be paid.

- Ms D feels that the Trustees have not honoured Mr E's intention for her to receive 100% of the lump sum as he had indicated on his nomination form. While the Adjudicator can see Ms D's view, the nomination form and other correspondence issued by the Scheme make clear that the nomination is only to guide the Trustees, and that they are not bound by it. In addition it is also stated that the Trustees will consider anyone nominated in a members Will as a beneficiary of the Scheme for the lump sum. There is no requirement for the Trustees to adhere to the nomination forms, they could make the decision not to award anything to the person or persons nominated by a member.
- The Adjudicator believes that the Trustees are correct to say that the property is irrelevant to the issue at hand. It was not in Mr E's possession at the time of his passing and it is not specifically mentioned in his Will. The Will leaves the remainder of his estate after repayment of debts, tax and fees to his three children. However, it has been confirmed that the estate was actually in deficit and therefore the children have not inherited anything. The Trustees are able to award the children all or part of the lump sum as they qualify as beneficiaries. It is reasonable for the Trustees to do so on the basis that Mr E's Will shows his intention to leave his children something. While Ms D may disagree as to the split of benefits the Adjudicator did not find that the Trustees have acted incorrectly.
- Further to this, Ms D has said that the Trustees have not taken into account her financial dependency on Mr E, her financial position, or her ill health, which means she will not be able to work again and has greatly impacted her earning capacity. The Trustees considered that the beneficiaries' financial positions are irrelevant as the exercise of discretion in relation to the lump sum is based on whether the definition of beneficiary was satisfied, not financial position. There is no requirement within the rules or legislation to require the Trustees to take financial position into account. Therefore it cannot be said that their actions in this respect were incorrect.
- Ms D has said that she feels that the Trustees have discriminated against her due to her not being married to Mr E. The Adjudicator did not agree. The Trustees have used their discretion to award her with a dependant's pension that is equal to that which she would have received had she been Mr E's spouse. It may have taken a little longer for her to be informed that she was getting this benefit while the Trustees considered the matter, however her pension was backdated to Mr E's date of death therefore she has not lost out financially.
- Ms D has also said that the Trustees have not properly taken into account the 30 year relationship that she and Mr E had. She feels that if they had, or if they had been married, she would have been awarded 100% of the death in service lump sum, or at least 80%. The Trustees have awarded Ms D with a dependant's

pension and a significant portion of the lump sum. The fact that Ms D feels she is entitled to more does not mean that the Trustees have not properly considered her relationship with Mr E.

- With regard to the percentage split of the lump sum; it is entirely at the discretion of the Trustees what to award each beneficiary, as long as they have taken into account the relevant information, not taken into account any irrelevant information or made a perverse decision. The Adjudicator believes that the Trustees have taken into account all relevant evidence and does not believe that any irrelevant information has been taken into account. While the Adjudicator recognised that Ms D may disagree, she does not consider that a perverse decision has been reached concerning the split of 50% to Ms D and 50% to be divided equally between the children.

16. Ms D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms D provided her further comments which are outlined below:-

- Ms D has said that the literature issued to Mr E is contradictory, most of it refers to dependants and does not mention beneficiaries under the Will. Where the literature does mention the Will it says "or" not "and" meaning it cannot be viewed in conjunction with the nomination form.
- The Will is separate and if the children were not named they wouldn't have a claim on the Will legally as they were not dependant. Therefore, how do they have a claim on the pension when they were not nominated and not dependant?
- Ms D feels that the Trustees have not acted morally, in that they have not considered Ms D's circumstances or the vulnerable position she has been left in.
- Ms D feels that the nomination form shows that Mr E's intention was for her to have 100% of the lump sum. The Will shows an intention to leave his estate to the children but not the pension. Ms D says that it is not always possible for wishes to be carried out, for example they intended to get married but Mr E passed away before they could do so. Therefore, the fact that there was nothing in the estate is unfortunate but that should not mean that the children have a share of the lump sum.
- Mrs D would like the decision to be re-made properly, respectfully and with humanity, thereby taking account of Mr E's wishes.

17. The comments 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 Ms D for completeness.

Ombudsman's decision

18. The Trustees have supplied copies of correspondence, where there are references to death benefits, issued to Mr E over the 10 year period prior to his death. The last member booklet was produced in 2002, and details the benefits payable in the event of a members' death in service. However, it does not provide details of who qualifies as a beneficiary under the Scheme Rules, nor does it make any reference to dependants, it simply states what is payable. It does say that the lump sum is payable at the Trustees discretion and that if a nomination form has been completed the Trustees will take this into account. I agree that the nomination form has been taken into consideration, therefore the Trustees actions are in accordance with what is described in the booklet.
19. Mr E was also supplied with annual benefit statements while a member of the Scheme. The benefit statements did not vary significantly in format and the latest statement issued in 2014 includes details of benefits payable in the event of death in service. Again, there is no reference to beneficiaries or dependants, however it does say that a nomination form should be completed and will be used to guide the Trustees when exercising their discretion. It also states "Please note that the Trustees are not legally bound by the Nomination Form or your last Will and Testament." While it does not explicitly say that those named in a Will are beneficiaries this sentence does suggest that this is the case.
20. Mr E completed a nomination form on 23 November 1998 which nominated Ms D to receive 100%. This nomination form includes a list for the member to indicate how the person named is related to the member or qualifies as a beneficiary. This includes "a beneficiary under my Will", indicating that the Trustees will take a Will into account when using their discretion.
21. I do not agree that the use of "or" means that the Will and nomination form cannot be viewed in conjunction. Instead the use of "or" allows the Trustees to view both the Will and nomination form, as well as one independently from the other. For example a member may not have a Will but has completed a nomination form, or vice versa.
22. I agree that apart from designating whether a person is within the class of beneficiaries as set out in the Rules of the Scheme, the beneficiaries named in the Will are separate from those entitled to Scheme benefits. However, this does not mean that because the adult children may not have benefited from Mr E's estate under the Will if they had not been named, that they should not have a claim on the pension because they have not been nominated. Different rules and legislation apply to wills and to pension schemes. The Scheme must adhere to its Rules and any overriding legislation. Under the Scheme Rules, included in the definition of beneficiary is anyone named in the members Will. The children are named in Mr E' Will and so fall within the Scheme definition of beneficiary.
23. The Trustees have absolute discretion in the allocation of the lump sum. They are required to follow the Rules of the Scheme and can only award it to someone who

falls within the Scheme definition of beneficiary. They are expected to ask themselves the right questions, take into account all the relevant evidence and no irrelevant evidence and not reach a decision that no reasonable person making the same decision would reach. They are not required to take into account financial or personal circumstances of each beneficiary. I believe that the Trustees have carried out their duty correctly.

24. While the nomination form may show the preference to award 100% of the lump sum to Ms D, this is not the only aspect for the Trustees to consider. I agree that the Will also shows Mr E's intention to provide for the children. It is clear that the children qualify as beneficiaries under the Scheme Rules and the Trustees have the discretionary power to allocate the benefits as they see fit. The lack of money in Mr E's estate is not why the children qualify under the Scheme, however, I agree with the Trustees that it is a consideration they can take into account when deciding the allocation of the lump sum.
25. I do not agree that the decision should be re-considered, therefore, I do not uphold Ms D's complaint.

Anthony Arter

Pensions Ombudsman
15 June 2017