

## Ombudsman's Determination

Applicant	Mr N
Scheme	Commando 2012 Pension Scheme ( <b>the Scheme</b> )
Respondents	Liddell Dunbar Limited ( <b>the Administrator</b> ) Trustees of Commando 2012 Pension Scheme ( <b>the Trustee</b> )

## Outcome

1. Mr N's complaint against the Trustee and the Administrator is partly upheld, but there is a part of the complaint I do not agree with. To put matters right for the part that is upheld, the Trustee shall reconsider its decision whom to distribute death benefits to and pay Mr N £1,000 in respect of his distress and inconvenience. The Administrator is not required to take further action.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr N's complaint against the Trustee is about its decision not to award him 50% of the value of his late brother's Scheme benefits. Moreover, he is unhappy about the Administrator's failure to provide him with updates on the Trustee's decision.

## Background information, including submissions from the parties

4. Originally, Mr N's brother, Mr B, was an employee of Norton Motorcycles (UK) Ltd (**the Employer**) and member of the Scheme. Mr Stuart Garner is both CEO of the Employer and Trustee of the Scheme.
5. Payment of benefits under the Scheme is governed by the Commando 2012 Pension Scheme Rules (**the Rules**). In particular, if a member dies before benefits come into payment, Part 8.1 of the Rules (see Appendix) applies as follows: -

"A member may choose that, if he or she dies before pension date, the member's fund will be used to either: (1) Secure a survivor's pension through the purchase of an annuity from an insurer (that is a pension for the widow or widower or surviving civil partner, and/or one or more dependants), or (2) Secure a survivor's pension through income drawdown to the widow/widower/surviving civil partner; or (3) Pay a lump sum."

6. Mr N claims, sometime after joining the Scheme, Mr B completed an “expression of wish” form. Mr B apparently stated therein that, in the event of his death before taking benefits, 50% should be paid to his daughter, Miss L, with the rest being paid to Mr N.
7. In September 2017, Mr B died.
8. In October 2017, Mr N informed the Administrator of the above.
9. In December 2017, Mr N wrote to the Trustee, c/o the Administrator, informing it of the late Mr B’s wishes regarding distribution of death benefits. He had learned from his financial adviser that the Trustee intended to pay 100% of the death benefits to Miss L. He formally complained about this decision and said payment of the benefits should be put on hold until this matter would be resolved.
10. In January 2018, Mr N wrote to the Trustee, requesting an update. He said he was writing to it directly, having received no response from the Administrator, following several phone calls, emails and letters.
11. In February 2018, dissatisfied with the lack of response, Mr N referred his complaint to the Pensions Advisory Service. Later, he referred his complaint to this Office.
12. In May 2018, this Office told Mr N to complain under the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). He then did so.
13. In June 2018, the Administrator contacted Mr N, and said the Trustee was standing by its decision to pay 100% of the death benefits to Miss L. It also said this could only be changed by a written instruction from Miss L (or a direction from the Pensions Ombudsman). Mr N appealed the decision.
14. Later, the Administrator contacted Mr N, and said the Trustee had reviewed Mr N’s complaint, but was standing by its decision.
15. In July 2018, this Office wrote to the Administrator, requesting its formal response.
16. In August 2018, the Administrator contacted this Office, saying it had acknowledged and responded to all the correspondence it received from Mr N. Also, it forwarded all his correspondence to the Trustee. Finally, it had acted on the Trustee’s instructions, it had no control over the Trustee’s decision, its reasons or how long it took to decide.
17. On 18 October 2018, the Adjudicator sent an email to the Trustee, and asked it to provide evidence of its decision-making process. The Trustee responded and asked the Adjudicator to send him a letter instead. So, the Adjudicator sent him a letter and asked him to respond no later than 2 November 2018. But no response was received.
18. On 2 November 2018, the Adjudicator wrote to the Trustee again, asking it to send its response no later than 9 November 2018. However, as at 29 November 2018, no response had been provided - and no extension had been requested - therefore the Adjudicator issued his Opinion on the complaint.

## Adjudicator's Opinion

- The Adjudicator concluded that no further action was required by the Administrator, but that further action was required by the Trustee. The Administrator was only responsible for carrying out basic administration tasks; it was not responsible for deciding how to distribute Scheme benefits (or death benefits in particular).
  - Whilst the Administrator could have responded more promptly to Mr N's concerns, it was reliant on the Trustee for its information. Therefore, the Adjudicator did not think the Administrator had acted in maladministration.
  - Turning to the Trustee, the Adjudicator said this Office had an established approach to cases involving trustees' use of discretion. In particular, we would look to see:
    - If the rules/regulations governing the scheme included a discretion (and, if so, who was supposed to exercise it and in what circumstances);
    - If the decision-maker had taken into account everything that was relevant (and nothing that was irrelevant) and reached a rational conclusion (though this did not necessarily mean deciding what was in the claimant's best interest);
    - If the decision-maker was an employer, it might be able to take its own interests in account (particularly if there were costs involved); and, trustees might have to consider the interests of the pension scheme as a whole; and
    - We might ask to see all the information that the decision-maker had at the time and any records of meetings where the decision was made (together with any other details considered in making the decision); and
    - If we decided that there was an error in the process, we would usually tell the decision-maker to reconsider the matter. If so, we would tell him to disregard any steps already taken, such as deciding to pay money to another person.
  - Mr N's complaint was simple; that is, he should have been awarded 50% of the value of the late Mr B's Scheme benefits. There was insufficient evidence that he was entitled to this - he said the late Mr B completed an expression of wish form to this effect but this had not been substantiated. But nor was there any evidence that Mr N was not so entitled. More importantly, the Trustee had provided no evidence that it followed a proper decision-making process when deciding to distribute death benefits to Miss L.
  - In the Adjudicator's view, the Trustee had acted incorrectly as it had failed to provide any evidence that it had acted correctly - in circumstances where that evidence should have been documented, and should be simple to provide. He therefore said that the complaint should be upheld; and that, within that, within 21 days, the Trustee should reconsider the matter, make a fresh decision and provide its reasons to Mr N.
19. Mr N agreed with the Adjudicator's Opinion and made no further comments. The Trustee did not respond and the complaint was passed to me to consider.

## **Ombudsman's decision**

20. In light of the Trustee's failure to respond, following the Adjudicator's letters dated 18 October, 2 November and his Opinion of 29 November, my decision as outlined below is based on the evidence currently available, which is necessarily limited.
21. Like the Adjudicator, I find that whilst the Administrator could have responded more quickly, it was mostly reliant on the Trustee. Therefore, I do not find that it made any administrative errors.
22. Mr N has told this office that he tried to put his case to the Trustee to be considered as a beneficiary under the relevant scheme rule but was refused the opportunity to do so. He has been given, and I have been provided with, no reasoning for the Trustee's distribution decision. The administrator has confirmed that the Trustee is refusing to reconsider the decision, again without giving reasons.
23. The Trustee is bound to make sufficient enquiries to establish the class of beneficiaries who are potentially entitled to a share in the scheme death benefits, to consider the merits of their respective claims, including any expression of wishes permitted by the scheme rules and in fact made by the deceased. I am not satisfied on the balance of probabilities that the Trustee has carried out this exercise with sufficient diligence. In particular it is necessary to consider any evidence of dependency which Mr N wishes to provide before the distribution decision is made. Failure to do this is both a mistake of law and maladministration. A signed letter from a beneficiary to whom a distribution has in fact been made is not a necessary requirement before the Trustee conducts a review of its original decision. To apply this criteria instead of conducting an IDRP process is maladministration.
24. Therefore, I uphold Mr N's complaint against the Trustee; I do not uphold the complaint against the Administrator.
25. I therefore make the direction below with the aim of remedying the injustice. I am not the decision-maker, therefore my direction outlined below cannot pre-determine the outcome of a proper application of the rules of the Scheme. In determining the level of distress and inconvenience which Mr N has suffered, I am mindful that the Trustee has refused to cooperate with the dispute resolution processes which should be available, including failing to respond to enquiries from my office. Regardless of whether or not Mr N is entitled to be considered as a beneficiary and whether he is ultimately awarded a share of the death benefits, he is entitled to have his claim properly considered. The Trustee's failings will have caused Mr N serious distress and inconvenience which is yet to be remedied.

## **Directions**

26. Within 21 days of the date of this Determination, the Trustee shall:

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- Write to Mr N, request any submissions he wishes to provide in support of his claim, then confirm it will make a fresh decision about distribution of the death benefits.
- In communicating its decision to Mr N, the Trustee shall: state its reasons for distributing in the way it does; highlight the Scheme rules used in making its decision; and, highlight the information/evidence considered in reaching its decision, e.g. any expression of wish form, and any evidence of financial dependency.
- Pay Mr N £1,000 in respect of his serious distress and inconvenience.

**Karen Johnston**

Deputy Pensions Ombudsman  
19 December 2018

## Appendix

### 8 MEMBER DIES BEFORE BENEFIT STARTS

#### 8.1 Options Available

A member may choose that, if he or she dies before pension date, the member's fund will be used to either:

- (1) Secure a survivor's pension through the purchase of an annuity from an insurer (that is a pension for the widow or widower or surviving civil partner, and/or one or more dependants), or
- (2) Secure a survivor's pension through income drawdown to the widow/widower/surviving civil partner; or
- (3) Pay a lump sum.

If the member does not make a choice under this rule and there is a survivor then the trustees may decide how the member's fund should be used in accordance with this rule.

Annuity payments under option (1) of rule 8.1 should come into payment as soon as possible following the member's death. Annuity payments should be backdated to the date of death of the member.

Capped or flexible income drawdown payments under option (2) of rule 8.1 must start with effect from the date of death of the member.

#### 8.2 Survivor's Annuity

##### 8.2.1 Choice of Provider

If option (1) of rule 8.1 applies and the member has notified the scheme administrator that he or she wishes the pension to be secured from a particular insurer, then the trustees and scheme administrator must buy the annuity from that insurer.

In any other case where option (1) of rule 8.1 applies, the scheme administrator must write and tell the survivor that he or she has the right to choose an insurer. The survivor then has three months from the date of notification to write back and tell the scheme administrator which insurer he or she has chosen. If the survivor chooses an insurer, he or she may at the same time decide whether any of the options in rules 8.2.2 to 8.2.3 will apply to the pension provided by the annuity.

If a member or survivor does not choose which insurer the annuity is purchased from by writing to tell the scheme administrator by the latest date permitted under this rule then the trustees and scheme administrator will choose the insurer and will decide which (if any) of the alternatives in rules 8.2.2 to 8.2.3 will apply to the pension.

Any part of the member's fund that cannot be used to buy survivors' pensions or to pay survivors' lump sums will be used by the scheme administrator to meet general administration expenses of the scheme.

A widow or widower or surviving civil partner who is under the age of 60 when the member dies may choose to defer all pension benefits to any later time up to his or her 60th birthday.

Where the survivor's annuity is not being deferred, the purchase of a survivor's annuity must occur as soon as practicable after the member dies, and the annuity payments should be backdated to the date of death of the member.

### **8.2.2 Duration of Survivors' Annuities**

A pension payable to a person who is a dependant solely because that person is under age 23 when the member dies must stop when the dependant reaches age 23.

A survivor's pension that is not covered by the above rule must be paid for the survivor's life, although it may stop if the survivor remarries/marries.

### **8.2.3 Minimum Payment Guarantee**

A survivor's pension bought with a member's fund may (but need not) be on terms that it will in any event be paid for a guarantee period not exceeding ten years. Then, if the pension would have stopped in accordance with rule 8.2.2, it will be paid for the rest of the guarantee period to another individual, or to the estate of the member or of another individual who dies after the member (and the recipient may vary from time to time).

Where the pension continues and is payable to another individual it may either continue to be payable for the full guarantee period in any event, or be arranged so as to stop if at any time the individual to whom it is being paid marries or reaches age 23.

## **8.3 Survivor's Income Drawdown**

If option (2) of rule 8.1 applies and the member has advised the scheme administrator how funds belonging to specified arrangements should be allocated between survivors, the scheme administrator will establish drawdown funds for each nominated survivor in accordance with the member's wishes. This may if required involve splitting arrangements in accordance with rule 3.5.

If the member has not given such advice, the scheme administrator will allocate the funds belonging to the member's arrangements between survivors according to his best judgement. This may if required involve splitting arrangements in accordance with rule 3.5.

Upon establishing the drawdown funds, the scheme administrator will calculate the Basis Amount applicable to each survivor, and will write to the survivors advising them of the maximum drawdown income to which they are entitled for the first reference period. The survivor should, within three calendar months of this advice, notify the scheme administrator in writing of their desired level of gross income (up to 100% of the Basis) and the desired frequency of payment (not less frequent than yearly) for the first Year.

If the survivor provides the scheme administrator with the above information within the time specified, the scheme administrator will operate income drawdown in accordance with the survivor's requests. If the survivor does not notify the scheme administrator of his or her requirements within the time specified, the scheme administrator will act upon the assumption that the maximum income is required, and that the payment interval will be yearly.

For Years subsequent to the first, the survivor may vary the level of drawdown by giving written notice to the scheme administrator not less than three months prior to the start of the Year. If such notification is made after this time limit, the administrator may (but need not) continue to operate drawdown for the Year on the basis used in the previous Year.

If the survivor satisfies the conditions of Rule 6.7 for any Pension Year, they may receive payments of flexible drawdown income (ie income in excess of the Basis Amount up to the amount available within the drawdown fund).

### **8.3.1 Right to Claim Uncrystallised Funds Lump Sum**

At any time during the two years beginning with the member's death but before the survivor's 75<sup>th</sup> birthday, any or all of the arrangements originally in use to provide the survivor with income drawdown may be converted to pay a lump sum benefit to the survivor. In order to ensure that the lump sum benefit can be paid within the two years prescribed by law, the survivor must make a written request to the scheme administrator no later than two months prior to the second anniversary of the member's death.

## **8.4 Survivor's Lump Sum Benefits**

The scheme administrator will pay any lump sum due under option (3) of rule 8.1 within two years of the member's death. If this is not practicable then, at the end of two years, it will be transferred to a separate account outside the scheme until it can be paid.

### **8.4.1 Lifetime Allowance Charge**

The scheme administrator is not responsible for any tax which may be due under the terms of section 214 of the 2004 Act. This responsibility rests with the legal personal representatives of the member.

All lump sum death benefits paid out in accordance with rule 8.5 will be paid out gross. The scheme administrator will provide on demand to the legal personal representatives of the member a full list of lump sum death benefit payments in order to assist them in complying with their legal responsibilities.