

Ombudsman's Determination

Applicant	Mrs T
Scheme	HSB Houghton Engineering Insurance Services Limited Retirement Benefits Scheme (the Scheme)
Respondent	The Trustees of the HSB Houghton Engineering Insurance Services Limited Retirement Benefits Scheme (the Trustees)

Outcome

1. I do not uphold Mrs T's complaint and no further action is required by the Trustees.

Complaint summary

2. Mrs T has complained about the manner in which the lump sum death benefit payable on the death of her husband has been distributed. She has complained about the interpretation of the Scheme Rules and the way in which the evidence has been applied in reaching a decision.

Background information, including submissions from the parties

Background

3. Mr T was employed by HSB Houghton Engineering Service Ltd (the **Company**) from 2001 until his death in April 2016. He was a member of the Scheme.
4. In 2016, the Trustees decided to distribute the lump sum in equal parts to Mrs T and to Mr T's three children from his former marriage. Mrs T appealed the Trustees' decision and eventually brought a complaint to The Pensions Ombudsman (**TPO**). Following correspondence between a TPO adjudicator, the Trustees and Mrs T, the Trustees agreed to revisit their decision. Mrs T's complaint was withdrawn on the basis that the parties had agreed a resolution¹.
5. The Trustees reached a fresh decision on 10 January 2018. Mrs T submitted a further complaint to TPO on 3 April 2018. This Determination relates to the 2018 decision.

¹ Confirmed by letter dated 28 November 2017

6. The relevant provisions are contained within the Second Definitive Trust Deed and Rules dated 28 April 2006. There have been four subsequent deeds of amendment: 9 June 2006; 8 January 2008; 21 April 2015; and 4 May 2016. Clause 12 contains the Amendment Power and states:

“The Principal Employer may with the consent of the Trustees by deed or by resolution of its board of directors amend or vary all or any of the provisions of the Definitive Trust Deed and Rules. Any amendment or variation may be made retrospectively insofar as permitted by law and any amendment or variation made shall satisfy section 67 of the Pensions Act 1995 and shall not alter the purpose of the Scheme or prejudice Tax Approval.”

7. Clause 9.8.1 provides for decisions by the Trustees to be unanimous.

8. Rule 11 provides for lump sum death benefits. Rule 11.1 states:

“If a Member dies before his Normal Retiring Date and before the Pension Date, there shall be payable in accordance with Rule 19.2 a lump sum equal to the total of his own contributions (if any) to the Scheme ... plus, at the Trustees’ discretion, reasonable interest on any AVC Scheme Contributions provided that in the case of a Member who continues in Pensionable Service on or after his Normal Retiring Date until the date of his death the words “before his Normal Retiring Date and” shall be omitted.”

9. Rule 11.2 states:

“If a Member dies whilst in Pensionable Service, there shall ... be payable in accordance with Rule 19.2 a lump sum equal to the total of:-

- 11.2.1 four times his Pensionable Salary
- 11.2.2 any benefit conferred under Rule 17 [Transfers to the Scheme] which was arranged to be payable under this Rule; and
- 11.2.3 any benefit provided under Clause 13 [Augmentation of Benefits] which was arranged to be payable under this Rule.”

10. Rule 19.2 states:

“Payment of lump sums on death

- 19.2.1² Any lump sum which is expressed to be payable under Rule 19.2 shall within the period of two years commencing on the date of the Member’s death be paid to the Member’s estate and/or be paid or applied to or for the benefit of any one or more of his Dependants, his Relations, the individuals entitled under his will to any interest in his estate and the persons mentioned in a statement of wishes form as described in Rule 19.2.3 who are

² Amended by deed dated 21 April 2015

living at this death, in such shares and in such manner as the Trustees shall decide.

...

- 19.2.3 In exercising their discretion under this Rule the Trustees may take account of, but shall not be bound by, any wishes of the Member as expressed in a statement of wishes form received by the Trustees before the death of the Member and not revoked by the Member ..."

11. "Dependant" is defined as:

"in relation to any person (hereinafter called the "Principal") means any individual who is, or at the date of the Principal's death was,

- (1) his Spouse, or
- (2) a child of his (including a step-child or legally adopted child) aged less than 18, or aged 18 or more but receiving full-time educational or vocational training, or
- (3) in the opinion of the Trustees:
 - (a) wholly financially dependent on the Principal;
 - (b) in a relationship of mutual financial dependence with the Principal; or
 - (c) living with the Principal as if husband and wife or civil partners (but not so as to include any person who in the Trustees' opinion was in a casual relationship with the Principal) ..."

12. "Relations" are defined as:

"the grandparents of the Member and of his Spouse and all descendants of those grandparents and all spouses of those descendants. For the purposes of this definition:-

- (1) a step child or legally adopted child shall be considered to be an actual child;
- (2) "Spouse" shall include a widow, widower or surviving civil partner and any former wife or husband."

Timeline

April 2009 Mr T completed an expression of wishes form. He indicated that he wished any lump sum death benefit payable on his death to be divided equally between his three children. At the time, they were aged 14, 18 and 20.

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June 2009	Mr and Mrs T purchased a property.
May 2014	Mr and Mrs T were married.
November 2014	Mr and Mrs T re-mortgaged their property.
13 November 2014	A mortgage consultant wrote to Mr and Mrs T. Amongst other things, he said he was enclosing a life cover quote. He suggested that they consider this instead of relying solely on their death in service cover as discussed.
April 2016	Mr T died. At the time, Mr T's children were aged 27, 25 and 21. Mr T had not made a will.
5 May 2016	<p>Mrs T completed an information form for the Trustees. In addition to providing details of Mr T's children, his parents and his brother, Mrs T included the statement:</p> <p>"[Mr T] had only one financial dependant which was his wife [Mrs T]. On purchasing their home together [Mr T] provided his pension details to the lender as insurance to cover repayment in these circumstances."</p>
14 June 2016	<p>Mrs T emailed the Scheme administrators with a copy of a letter discussing the death in service to cover mortgage repayments. She pointed out that the nomination form currently held had been completed before her marriage to Mr T. She said Mr T had informed her that the form had been changed since they had bought their house. Mrs T said she had changed her own nomination form to cover Mr T in the event of her death.</p> <p>In its response, the Scheme administrators said the Company had agreed to look for an updated expression of wishes form. It also explained that payment of the death benefit was a discretionary decision. It said the Trustees were meeting on 15 June 2016 to discuss the situation.</p>
16 June 2016	Mrs T provided further information relating to the discussions she and Mr T had had with their bank.
17 June 2016	Mrs T submitted a personal statement. This included a copy of a questionnaire completed, in 2014, when Mr and Mrs T applied for a re-mortgage. Under the heading "Security", the questionnaire noted that both Mr and Mrs T had company pension schemes with death in service.
July 2016	<p>The Scheme administrators asked Mr T's children to complete forms.</p> <p>Mrs T provided a further statement, including details of her outgoings.</p>

- August 2016 Mr T's son informed the Scheme administrators that his younger brother was not in any full-time education. He said none of the children had been financially dependent on their father on a regular basis. He said he had received irregular payments from his father when he needed them.
- September 2016 Mrs T confirmed to the Scheme administrators that she did not have a copy of any expression of wishes completed by Mr T later than the 2009 copy held by the Trustees. She said she had received no financial help from Mr T's family and had paid the funeral costs herself. Mrs T said not being awarded the full lump sum death benefit would result in her having to sell her home.
- 1 November 2016 The Trustees came to a decision to distribute the lump sum death benefit equally between Mrs T and Mr T's children.
- 21 November 2016 Mrs T asked the Trustees to reconsider their decision. The Trustees were also provided with a letter from Mr T's father in which he asked them to review their decision.
- December 2016 The Scheme administrators informed Mrs T and Mr T's children that payment would be delayed because the Trustees' were reviewing their decision.
- Mr T's son emailed the Scheme administrators providing details of an accident at work he had suffered and saying it was unlikely that he would be able to work again. He also said insurers had declined a claim for compensation and it was likely to be some time before a settlement was reached. He said his siblings were single parents on low income and that all three of them had been financially dependent on their father.
- The Scheme administrators contacted the mortgage provider to request any records relating to the discussion with Mr and Mrs T.
- In response to a request to provide a copy of any relevant documents, Mr T's father said he did not have such a document and did not wish to be involved.
- The Chair of the Trustees spoke to Mr T's children and his brother on the telephone. Copies of her notes have been provided.
- January 2017 The Trustees wrote to the mortgage provider requesting information about Mr and Mrs T's application. In particular, they asked whether death in service cover had been a prerequisite for the provision of a mortgage and whether Mr T had made any statements relating to an expression of wishes.

Mrs T submitted a further statement, together with a bundle of documents. These documents included a credit card balance notification, funeral costs invoices, handwritten notes by Mr T relating to payments to his children, copies of text messages between Mr T and his son, a letter to Mr T's daughter from a debt recovery company, a letter from the DWP to his son relating to payment of ESA, and witness statements from friends.

The mortgage provider sent the Trustees copies of the mortgage documents and statements.

- February 2017 The mortgage provider confirmed that it was not a condition of the mortgage to have life cover and it did not hold details of any death in service benefits for Mr T.
- April 2017 The Trustees issued a decision confirming their decision to distribute the lump sum death benefits equally between Mrs T and Mr T's children.
- June 2017 Mrs T applied to TPO.
- November 2017 TPO's investigation was closed and Mrs T's complaint was considered withdrawn because the Trustees had agreed to revisit their decision.
- 6 December 2017 The Trustees wrote to Mrs T and the children offering to meet with them to enable them to put forward any new information.
- 18 December 2017 The Trustees met with Mr T's children (jointly) and Mrs T (separately). Mr T's brother accompanied the children. Mrs T was accompanied by a barrister. The Trustees were not willing to meet with Mrs T in the presence of a barrister. Mrs T opted to proceed on her own.
- Copies of the notes of both meetings have been provided.
- 10 January 2018 The Trustees met to discuss the distribution of the lump sum death benefit. All the Trustees were present and they were attended by their legal adviser. A copy of the minutes of the meeting has been provided.
- 19 January 2018 Mrs T and the children were informed of the Trustees' decision. Mrs T was provided with a copy of the minutes from the Trustees' meeting.
- 28 March 2018 The Trustees distributed the lump sum death benefit. Mrs T received £44,155.44. Mr T's children received £44,155.44 each less an amount representing outstanding loans they had received from their father. Mr T's estate received £3,783; being the sum of the outstanding loans.

Mrs T's position

13. Mrs T says the basis of her complaint is the decision by the Trustees to distribute the lump sum death benefit in four equal parts. She says the original distribution was only adjusted to take account of loans owed to her husband's estate by his children. Mrs T disagrees that the Trustees came to a fresh decision.
14. Mrs T has submitted 16 grounds for complaint as follows:-

1. The Trustees failed to follow their own policies, procedures, rules and best practice

Mrs T submits that Rule 19.2 provides that a discretion only arises when there is an expression of wishes form which names persons also named in a will. She argues that only then do the Trustees have a discretion as to how the lump sum death benefit is distributed; if there is no will, the lump sum must be paid to the estate.

Mrs T has referred to the members' personal benefit statement, which states: "If you should die ... Your dependants or estate will receive a lump sum ...". She says the Trustees have acknowledged that the benefit statement was simplistic and may have led Mr T to believe that updating his expression of wishes was not necessary.

Mrs T submits that the April 2015 amendment to Rule 19.2.1 provided for an expression of wishes form to be considered along with dependants, will and estate. She submits that, prior to this amendment, lump sums would be paid to the member's estate if there was no will automatically protecting the spouse. She says this amendment was not communicated to members.

Mrs T has referred to guidance provided by the Trustees' legal advisers which states:

"The trustees should act honestly and reasonably, make proper enquiries, take advice as appropriate, and reach a decision fairly on the basis of knowledge of the member's family, financial circumstances and will, ignoring their own political, religious or moral views or prejudices."

Mrs T submits that this guidance refers to the member's financial circumstances; not those of the family. She submits that financial circumstances should only be taken into account in determining dependency. She argues that she was Mr T's only dependant. Mrs T says the Trustees have stated that they did not consider detailed reviews of the potential beneficiaries' financial position. She says she pointed out that this was at variance with the guidance and this was noted by the Trustees but not commented on. Mrs T says the Trustees' legal adviser confirmed that the member's financial circumstances was a relevant factor but the Trustees did not give it the importance it required.

Mrs T has suggested that comments in the Trustees' minutes about giving Mr T's children a fresh start indicate that they failed to follow the correct legal criteria.

Mrs T points out that the legal adviser's guidance also required the Trustees to identify possible recipients. She says that the Trustees failed to undertake a thorough search until she had complained to TPO.

Mrs T submits that the Trustees failed to consider Mr T's estate as a potential beneficiary under Rule 19.2. She submits that a discretion only arises to pay the lump sum to relations and individuals named in a will if there is a will; otherwise, the discretion is only to pay the lump sum to the estate or dependants.

2. The Trustees have erred in their decision

Mrs T submits that the Trustees have come to a perverse, arbitrary and irrational decision which no reasonable body of trustees could have arrived at in reviewing all the relevant factors.

Mrs T suggests that the Trustees have looked no further than the 2009 expression of wishes and the fact that Mr T subsequently remarried.

Mrs T refers to the minutes of the Trustees' meeting on 10 January 2018. She has referred to the fact that the Trustees noted that she would receive an index-linked pension for life. Mrs T argues that the pension is an entitlement and should not have been taken into account in deciding the distribution of the lump sum. She also disagrees that her share of the lump sum would allow her to pay off a "large part of her outstanding mortgage". She says it covers slightly less than 25% of the outstanding mortgage.

Mrs T says that Trustees have disregarded the funeral costs, probate costs and Mr T's outstanding debts.

3. The Trustees failed to inform members about a fundamental change to the Scheme rules

Mrs T submits that the 2012 members' guide (see Appendix) does not reflect the Trust Deed and Rules as at April 2006 [*sic*]. She argues that a fundamental change was made to the application of the Trustees' discretionary powers in 2015 and they have been unable to demonstrate that this change was properly notified to Mr T. Mrs T is of the opinion that her husband would have relied on the 2006 rules under which the Trustees' discretion only arose if there was a will. Mrs T considers there to have been a modification of the Rules which should have been notified to the Scheme members.

4. The Trustees failed to scrutinise the available evidence

Mrs T submits that, when the Trustees met on 10 January 2018, they did not take any new factors into account. She argues that they only adjusted the previous allocations to allow for the children's debts, which had already been acknowledged as due by the children.

Mrs T submits that the Trustees have failed to detail their reasons for reaching their decision. She suggests that the Trustees failed to consider Mr T's actions at the time of his divorce, which demonstrated that he carried out his responsibilities to his former wife by ensuring mortgage payments were made. She argues that the Trustees chose to ignore the evidence of her and Mr T's joint mortgage commitment, Mr T's intention as evidenced by the mortgage suitability statement and his pledge to her. Mrs T also argues that the Trustees ignored numerous witness statements from friends of Mr T who provided their recollections as to what he had intended.

Mrs T argues that the 2009 expression of wishes is outdated because it was completed when Mr T had no potential beneficiaries other than his children. She says the children were no longer financially dependent on their father at the time of his death. Mrs T also questions why the Trustees did not consider Mr T's grandchildren. She believes it would have been her husband's wish that some provision should have been made for his grandchildren.

5. The Trustees failed to consider relevant facts or to disregard irrelevant facts

Mrs T submits that the Trustees considered irrelevant matters. She refers to the notes of the Trustees' meeting with other members of Mr T's family. She points out that matters such as the distribution of personal possessions and Mr T's ashes were discussed even though these were irrelevant to the Trustees' decision.

Mrs T submits that the Trustees placed too much focus on those who were not dependent on her husband instead of focusing on "the correct dependent spouse". She submits that some factors were discounted without any justifiable reasons being given.

Mrs T says the Trustees failed to take into account the fact that her husband's intention as to the future treatment of his death in service lump sum changed on 13 November 2014. She says this is evidenced by a letter from their mortgage consultant confirming their conversation. Mrs T says this information was provided to the Trustees in May 2016. She also says that her husband's intentions were confirmed by witness statements. Mrs T points out that the Trustees failed to ask for a clearer copy of a mortgage suitability document until December 2017. She suggests that this indicates that it was treated too lightly by the Trustees.

Mrs T submits that the Trustees were unduly influenced by Mr T's children's personal circumstances; in particular an accident suffered by one of his sons. This accident was mentioned on more than one occasion by the Trustees and she believes this influenced a bias towards her.

Mrs T submits that the financial circumstances of Mr T's children should not have formed part of the Trustees' decision making.

Mrs T submits that the Trustees should not have taken her spouse's pension into account when making a decision about the lump sum. She also says that the

Trustees failed to inform her that there was an option to substitute a lump sum for the spouse's pension.

6. The Trustees failed to ask the right questions

Mrs T submits that, if the Trustees had asked who the likely beneficiaries were and what would be reasonably expected for the distribution of the lump sum, logic would have taken them on a different path.

Mrs T has suggested that the logical approach to take would have been for the Trustees to have considered Mr T's costs and debts first. She has suggested that the Trustees could have used their discretion to distribute the lump sum after clearance of costs and debts.

7. The Trustees failed to diligently consider the evidence provided to them

Mrs T submits that her husband had informed her that an updated expression of wishes, naming her as beneficiary, had been completed at the end of 2014. She argues that the notes of their meeting with the mortgage provider is compelling evidence that the death in service lump sum was to be used to pay outstanding mortgage payments. Mrs T argues that the Trustees have placed undue emphasis on the 2009 expression of wishes. She considers that no proper consideration was given to the likely financial hardship to her resulting from the Trustees' decision.

Mrs T submits that the Trustees should have recorded all the information gathered and which factors were considered or disregarded, together with the reasons for their final decision.

Mrs T questions how the Trustees could have reviewed all of the relevant evidence, consisting of two lever arch files, in one short meeting.

Mrs T says the Trustees were provided with contradictory evidence relating to whether or not Mr T's children were financially dependent on him.

8. The Trustees failed to engage proactively with her

Mrs T says the Trustees have stated that any document relating to the Scheme found in the documents retrieved from Mr T's home after his death would have been passed to HR or returned to her. She says she has not been provided with a copy of a benefit statement dated 2016 despite having requested this on at least three occasions. She also says that she does not have a copy of a 2015 Scheme guide.

Mrs T says the Trustees have never explained the rationale for their decision.

9. The Trustees have taken an inordinate time in processing her affairs

Mrs T submits the Trustees took seven months to reach their first decision and five months to reach their second decision. She says the third decision was reached in under a month. Mrs T also says that she was not given time to respond to the notes of the Trustees' meeting on 18 December 2018, which were inaccurate.

10. The Trustees have shown a lack of transparency throughout the process

Mrs T submits that the Trustees have not disclosed what information they have considered or what they considered irrelevant. For example, she says they have not said whether they took any of the witness statements into account but they did consider a statement from Mr T's brother. Mrs T says she was not provided with details of the value of the lump sum death in service benefit and was only told it was four times the value of the equal shares. Mrs T says she pointed out that the lump sum was made up of salary and contributions and did not receive an answer to this.

11. There has been a lack of robust administration

Mrs T submits that she does not have copies of the paperwork removed from her home by the Company after her husband's death. She says the Trustees have stated that a thorough check had been completed but this was many months after the removal. Mrs T says, despite her many requests to conduct a search, she has not received this information. She says no asset register was produced when the Company collected its property.

Mrs T says the Trustees stated that the Company had conducted an extensive search for a 2014 expression of wishes of her husband's laptop but the expression of wishes was a paper-based exercise. She says a search of Mr T's laptop would not have uncovered an expression of wishes. Mrs T says her husband would have kept such a document in the files which were removed by the Company. She says she has been told that these files were shredded.

Mrs T says the Trustees have acknowledged that it was out of character for Mr T not to have updated his expression of wishes. She says they have acknowledged that their systems would not have been alerted if the expression of wishes had gone astray in the post; for example, no acknowledgment is sent to the member when a new expression of wishes is received.

Mrs T says she was provided with a copy of the 2006 Scheme Rules, in June 2016, by the Scheme administrators. She says she enquired if these were the most up to date version and was told that they were. Mrs T says this was incorrect because they did not include the April 2015 amendment.

12. The Trustees have misinterpreted the Scheme Rule in order to fall in line with the decision-making process

Mrs T submits that the Trustees have acknowledged that the wording of the annual benefit statement was simplistic and may have led her husband to consider updating his expression of wishes unnecessary. She is of the view that her husband believed that only those entitled to his estate would be entitled to the death in service lump sum. Mrs T has referred to her interpretation of Rule 19.2 as set out at point 1 above.

Mrs T says the Trustees have a duty to investigate and consider the circumstances at the time of the member's death; that is, changes in the member's current domestic

and financial circumstances. She has referred to the definitions of “Dependant” and “Relations” (see paragraphs 11 and 12 above). Mrs T submits that Mr T’s children do not meet the definition of Dependant. With regard to the definition of Relations, Mrs T submits that this only acknowledges these relationships and does not imply financial dependency.

13. The Trustees failed to take action on incorrect information supplied to them and to claims of fraudulent behaviour

Mrs T has referred to Rule 19.5, which states:

“Every Member or other beneficiary or prospective beneficiary to whom benefits may be payable from the scheme must at any time produce such evidence or information as may be reasonably required by the Trustees for the purposes of the scheme. If such evidence or information is not produced, the Trustees may withhold any benefit in relation to which the evidence or information was required until such time as it is produced. Where the Trustees have relied on a declaration, statement or other information given to them or an employer to determine the benefits of a member, dependant, relation or any other beneficiary or prospective beneficiary, and that declaration, statement or information subsequently proves incorrect, the Trustees may recover, reduce or otherwise modify the benefits payable to and in respect of those aforementioned as subject to the preservation requirements and the contracting-out requirements, they may consider appropriate.”

Mrs T says the Trustees received allegations from Mr T’s children and their solicitor that she had acted in a criminal way for pecuniary advantage. She says allegations about her were made to the police, who did not follow these up or contact her. Mrs T questions what action the Trustees took if they believed these allegations to be true. She believes that a layperson would have been influenced by such serious allegations. Mrs T says she was not aware of and not able to respond to the allegations. She says the matter was discussed with the police by one of the Trustees which breached data protection legislation. She says the Trustees expressed sympathy for Mr T’s children which indicates that they took the allegations seriously.

Mrs T also says that the evidence indicates that, on occasion, Mr T’s children have said they are acting on her behalf and she questions what action was taken by the Trustees as a result.

Mrs T says the Trustees were provided with incorrect information by Mr T’s children.

14. The Trustees have shown bias towards one group of beneficiaries

Mrs T cites correspondence, in 2016, between the Scheme administrators and Mr T’s children which said the Trustees did not expect to change their decision as a result of their review. She notes that the Trustees have said that this correspondence came from the Scheme administrators. However, she is of the view that the letters would

have been issued under instruction from the Trustees. She points out that draft letters were sent to the Trustees on 1 December 2016.

15. The Trustees lack knowledge relevant to the position they hold

Mrs T cites the minutes of the Trustees' meeting with her on 18 December 2018. In particular, she says the Trustees said they do not consider subjective personal information or detailed reviews of general financial means, wealth or expenditure. Mrs T says the Trustees have claimed to have conducted a full review of her mortgage requirements. She says she challenged the consideration of financial circumstances and the Trustees acknowledged her point.

16. Financial and mental impact on her

Mrs T submits that:-

- She has been unable to go through the natural grieving process because she has had to focus her energies on fighting for justice and following her husband's wishes.
- Each time she was contacted by Mr T's family or the Trustees she would be left hyperventilating and in a panic situation. She had trouble sleeping and her doctor prescribed tablets for depression. Her experiences have led to problems with her digestion which have resulted in her undergoing two operations.
- Her financial support from her husband disappeared overnight. Her income now goes on bills and she has no means to address emergencies, repairs, clothes, etc.
- She has had to resort to legal support which has incurred additional cost.
- She has been subject to unpleasantries on social media which has put a strain on her working life.

15. In addition to the above points, Mrs T also submits that there were material attempts to pervert the course of justice and unduly influence the Trustees.

16. Mrs T has also provided a submission from her barrister which is summarised below:-

- The Ombudsman has the authority to challenge the decision made by the Trustees.
- The Ombudsman has a wide jurisdiction. He cites *R v Parliamentary Commissioner for Administration ex parte Balchin* [1996] unreported, QBD [1997] JPL 917.
- In *Edge v The Pensions Ombudsman* [1999] 4 All ER 546, the judge said:

“Some two and a half years later, in *Wild v Smith* [1996] Mr Justice Carnworth adopted the judge’s formulation in *Harris v Shuttleworth* and observed that, to a public lawyer, those words were virtually identical to the so-called Wednesbury principles.”

- In *Wild v Smith*, the then Ombudsman upheld a complaint against the trustees, who had decided that a beneficiary was not dependent upon the member. The then Ombudsman determined that the trustees had exercised their discretion wholly unreasonably. This is what is pleaded in Mrs T’s case. The Ombudsman was entitled to conclude that the trustees had failed to investigate the matter adequately and this amounted to maladministration.
- Mrs T’s case can be distinguished from that considered in *Edge*. She is a wholly different type of beneficiary to that considered in *Edge*. In *Edge*, it was decided that the Ombudsman should not carry out an investigation where no particular benefit could accrue and where his decision might adversely affect parties who could not be a party to the process. In Mrs T’s case, she is the wife; that is, a fully entitled beneficiary. She is not a party for whom no benefit would accrue or a non-party to the process.
- There are circumstances where the Ombudsman should investigate the description of the beneficiary. In *Edge*, these were described as:

“Bad faith, dishonesty – those of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a great extent. For instance, we have heard in this case a great deal about the meaning of the word “unreasonable”.”
- In previous investigations, adjudicators have written to trustees asking them to set out the factors taken into account in reaching a decision. He cites *K00663* [2001]. This should be undertaken in Mrs T’s case before a final determination is issued.
- Whilst the Ombudsman does not have the power to substitute his own decision for that of the trustees, he does have the power to remit the decision for reconsideration.
- In *K00663*, the then Ombudsman said:

“In the vast majority of cases where a lump sum benefit is payable in circumstances where there is a surviving spouse, it is the surviving spouse who will be the beneficiary. Indeed, it is difficult to envisage circumstances where a decision to pay the lump sum benefit to the surviving spouse could not be justified.”

This begs the question as to why matters have been decided so differently in Mrs T's case.

- The legal advice given to the Trustees set out four steps which they should go through. These included identifying possible recipients of the benefit. The advice included who a Dependant is in terms of children; that is, if they are in full time education up to the age of 18 or after this time if they would have been permanently dependent due to a physical or mental impairment.
- In an email dated 9 August 2016, one of Mr T's sons confirmed that none of the three children were financially dependent on Mr T. The Trustees should have asked how old the children were at the time of Mr T's death. They should then have realised that their discretion should not include the children.
- The Trustees were aware that Mr T had a new wife who was financially dependent upon him. The minutes of the Trustees' meeting on 1 November 2016 identified Mrs T as the only Dependant because the children were over 21 and not in full time education. The question should have been asked as to why Mr and Mrs T's marriage was not given any weight.
- The Trustees engaged in a discussion about the 2009 expression of wishes, which is not a binding document. They went out of their way to try and justify using this document, which is meant to be merely a guide. Instead, the Trustees should have focused on the mortgage application questionnaire, which clearly expressed Mr T's revised intention. The questionnaire indicated that Mr T considered that he did not need a further policy to cover the house because he had a death in service benefit in place.
- It is unclear what questions have been asked by the Trustees. It does appear that financial circumstances were considered but it is not clear to what extent. Funeral costs were discussed and disregarded and the Trustees discussed the issue of Mr T's ashes.
- The Trustees assumed that Mr T completed an expression of wishes in contemplation of his house purchase with Mrs T but there is no evidence of this. This requires further investigation. The question of why due consideration was not given to the mortgage questionnaire should have been asked since this clearly superseded the 2009 expression of wishes.
- The Trustees said they were not bound by the expression of wishes form. It is therefore unclear why the 2009 expression of wishes form has been given such regard. Rule 19.2.3 of the 2006 Rules provides that the expression of wishes may not be considered. It is clear, from the January 2018 minutes, that the Trustees did consider it.
- A lot of focus has been given to the index-linked pension paid to Mrs T. It appears the Trustees felt that Mrs T was not worthy or needful of the lump sum because of this.

- The notes made by the Chair of the Trustees on 12 December 2016 indicate that some issues have been considered erroneously. In particular, the issue of the expression of wishes.
- Little regard has been given to the existence of a 2014 expression of wishes form. The Trustees accepted that this might have been lost.
- The Trustees should have been asked why they did not liaise with Mrs T when exercising their so-called discretion. The evidence indicates that the Chair of the Trustees had lengthy conversations with Mr T's children and his brother. This indicates an incorrect application of the discretion.
- There appears to have been an attack on Mrs T's credibility by Mr T's family. None of the allegations have been proven in a court of law and should be given no regard. There were also attempts by the family to harass Mrs T.
- There appears to have been a negative undertone or viewpoint in the Trustees' dealings with Mrs T.
- In a letter to Mrs T dated 30 June 2017, the Chair of the Trustees stated that there were no formal guidelines. This indicates that the Trustees were not following the rules and this is one of the key grounds for the Ombudsman to intervene.
- The Trustees' decision is perverse. This raises the issue of breach of trust. The powers of the Ombudsman are evidenced by the determination in *PO-763* [2015] and the judgment in *Hillsdown Holdings PLC v Pensions Ombudsman* [1997] 1 All ER 862.
- Consideration should be given to the Trustees' duties as outlined in guidance issued by the Government³.
- Breach of trust also raises the question of personal liability on the part of the Trustees.
- Mrs T has submitted a number of subject access requests and the level of redaction is of concern.
- Mr T's estate can be a beneficiary and it is not clear why this option was not explored as the most deserving along with the spouse.
- The Trustees relied on assumptions instead of solid evidence. In a letter to Mrs T dated 18 April 2017, the Chair of the Trustees referred to a conversation between Mr T and one of the Trustees. The Trustee was reported to have said he had spoken at length with Mr T about his son's accident and Mr T had given no indication that he would not want his children to benefit on his death.

³ www.gov.uk

- The decision in *Brewster* [2017] UKSC 8 is cited. The importance of spouses in receiving pension benefits is always paramount.

The Trustees' position

17. The Trustees submit:-

- In making their 2018 decision, the Trustees undertook proper and extensive enquiries, met with Mrs T and Mr T's three children, and investigated the matter thoroughly.
- The Trustees have reached a decision which satisfies the legal test for making this type of decision. This required them to:-
 - take into account all relevant matters and no irrelevant ones;
 - ask themselves the correct questions;
 - direct themselves correctly in law; in particular, to adopt a correct construction of the Scheme rules; and
 - not arrive at a perverse decision.
- The Trustees do not agree that they have misinterpreted the Scheme rules. Under Rule 19.2.1 as it stood in 2006, the lump sum death in service benefit could be paid to the member's estate, his Dependants, his Relations and the individuals entitled under his will "in such manner as the Trustees shall decide". The use of the term "and/or", in Rule 19.2.1, clearly shows that payment could be made to the estate or to any of the other categories. The comma after "living at this death" demonstrates that the Trustees' discretion applies to all categories.
- If, as Mrs T has suggested, the lump sum would always be paid to the estate if there was no will, it would no longer be a discretionary benefit and would not be paid free of inheritance tax.
- The 2015 deed of amendment introduced a new category of potential beneficiary; persons named in an expression of wishes form. This provided members with the flexibility to nominate a charity or someone who was not related to them. This amendment did not prejudice Mr T or Mrs T. The potential beneficiaries identified for the purposes of the Trustees' 2018 decision would have been beneficiaries under the previous version of Rule 19.2.
- It is correct that the Trustees said that they had considered Mr T's estate as a potential beneficiary. This does not demonstrate an inability to understand and apply the Scheme Rules correctly. It shows that they recognised the estate as a potential beneficiary in accordance with the Scheme Rules.

- The Trustees acknowledge that Mrs T raised the matter of considering Mr T's financial circumstances, rather than his family's. They checked with their legal adviser whether they should take the financial circumstances of Mr T and the beneficiaries into account. It was confirmed that these were relevant factors but they were not required to undertake a forensic analysis. They considered Mr T's financial circumstances in depth, together with those of the potential beneficiaries. It was clear that Mrs T, Mr T's children and his grandchildren would all benefit from the money.
- The Trustees disagree that they had not completed a thorough search for potential beneficiaries until Mrs T had complained to TPO.
- The Trustees appreciate that Mrs T would have come to a different decision, but that is the nature of discretionary decision-making. They considered all of the evidence they had gathered, weighted it appropriately and recorded their decision. They shared their notes of the decision with Mrs T in the interests of transparency.
- The Trustees do not consider that Mr T can have relied on the interpretation of the 2006 Rules as Mrs T has suggested. They consider it unlikely that Mr T would have read the 2006 Rules and there is no contemporaneous evidence to suggest that he shared Mrs T's interpretation of these Rules. If he had interpreted the Rules as suggested, he would not have updated his expression of wishes in 2009. If he was assuming that the lump sum would be paid to his estate, at the time this meant the monies would go to his children and he would not have needed an expression of wishes to provide for this.
- The interpretation of Rule 19.2.1 suggested by Mrs T is contrary to communications from the Trustees to the members indicating the significance of an expression of wishes and which categories of individual could be nominated.
- Mr T would have known, from his benefit statements, that Mrs T would be entitled to a spouse's pension. He may have factored this into his decision-making. The fact that this is an entitlement does not alter the fact that it is a death in service benefit from which Mrs T benefits.
- The Trustees do not consider the 2015 amendment to Rule 19.2.1 to be detrimental to members. The inclusion of an additional class of beneficiaries was beneficial to members and was communicated to them. They do not agree that the Scheme booklet is misleading.
- The 2018 decision was a completely fresh decision. As a result of the Trustees' review, and based on the available evidence, monies were paid to Mr T's estate.
- The notes of the Trustees' meeting on 10 January 2018, show that they fully recognised the financial commitments which Mr T had entered into and the

comments made about the death in service benefit. The information in the mortgage questionnaire is not as detailed as Mrs T has suggested. For example, it did not record that the lump sum was four times the member's salary. In addition, the Trustees established that provision of death in service benefits was not a prerequisite for lending.

- Dividing the lump sum into a part derived from salary and a part derived from a return of contributions is not required by the Scheme Rules. The Trustees were aware that this was how the lump sum was constituted and they were aware of Mr T's preferred method of allocation.
- The Trustees did consider Mr T's grandchildren and this is evident from the notes of their meeting on 10 January 2018.
- Throughout the process, the Trustees have endeavoured to treat all the beneficiaries impartially despite the various allegations made by the parties. They met with both Mr T's children and Mrs T. The Trustees asked Mrs T about funeral costs, outstanding loans, personal items and other matters. Had they not done so, Mrs T might have alleged that it was unfair to rely on the children's accounts. It is clear, from the notes of the 10 January 2018 meeting, that the Trustees did not take personal or lifestyle factors into consideration.
- The Trustees do not agree that they placed undue reliance on Mr T's 2009 expression of wishes. If they had based the decision solely on the 2009 expression of wishes, neither Mrs T nor the estate would have received a share of the lump sum.
- It is impossible to know whether Mr T did or did not update his expression of wishes. No-one has been able to find a further expression of wishes. The Scheme administrators sent a new form to members on two occasions in 2014 and again in 2015. The Trustees did not consider the 2006 expression of wishes because it had been superseded by the 2009 expression of wishes.
- Mrs T has drawn parallels between Mr T's position in 2006 and 2015. The Trustees acknowledge that, where the underlying facts are similar, there might be some merit in Mrs T's approach. However, they consider the facts pertaining to Mr T's situation in 2006 to be very different to those of 2015.
- It would not be fair to members to retain each expression of wishes whilst reminding them of the need to keep them updated. It would be contrary to members' expectations that all expressions of wishes were retained for future reference. It might also now breach the new general data protection regime.
- The Trustees disagree that they failed to proactively engage with Mrs T. They point to the fact that they met with Mrs T in December 2017. They point to the correspondence between themselves and Mrs T as evidence that they kept her updated and assisted with her enquiries.

- The Trustees have explained to Mrs T that a 2016 benefit statement for Mr T does not exist because he died before the statement was due to be issued. They have explained to Mrs T how her spouse's pension has been derived.
- Mr T was a homeworker and documents relating to his employment were collected by the Company. If there had been any personal documents within those collected, these would have been returned to HR or Mrs T.
- The Trustees accept that it has been a lengthy process but this has been the result of investigating matters thoroughly.
- The Trustees disagree that there has been a lack of transparency. They are of the view that the correspondence shows that they have tried to keep the potential beneficiaries up to date and have dealt with numerous queries.
- The Trustees reviewed the witness statements provided by Mrs T. This evidence was one of the factors they took into account in granting Mrs T her share of the lump sum.
- The Trustees authorised extensive searches of the pension administration, HR and payroll files relating to Mr T in an effort to find a more up to date expression of wishes. They also commissioned the Company's IT department to look on Mr T's work laptop. They made enquiries with the members of staff who collected the Company's paperwork from Mr T's home. No personal documents were found.
- The Trustees acknowledge that no receipt is issued for an updated expression of wishes. They understand that this not uncommon amongst occupational pension schemes. They have suggested that there should be an element of personal responsibility in such matters. If Mr T had submitted a new expression of wishes, he could have asked for a receipt or kept a copy himself.
- The Trustees have enquired with the Scheme administrators as to whether Mrs T was provided with the 2006 Trust Deed and Rules. The administrators have confirmed that they did not send Mrs T all the subsequent deeds of amendment. The Trustees apologise for this but do not consider that anything turns on this.
- With regard to the matter of fraudulent behaviour, the Trustees believe that this relates to a letter provided by Mr T's father which was later withdrawn. The Trustees were contacted by the police but they understand that the police are not taking any action on the matter. Once the letter had been withdrawn, the only appropriate action for the Trustees was to give it no merit.
- The Trustees challenged the assertion that Mr T's children were acting on Mrs T's behalf and it was apparent from the correspondence that they were not. Inconsistencies in the children's statements were dealt with at the meeting in December 2017.

- The Trustees do not agree that they have shown bias towards any group of beneficiaries and they consider the documents evidence this.
- The Trustees appreciate that it must have been a difficult time for Mrs T and for all those affected by Mr T's death.
- The Trustees did not tell Mr T's family that a fresh review of their decision would not change the outcome.

Adjudicator's Opinion

18. Mrs T'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:-

- Entitlement to death benefits was determined by the Scheme Rules. The Scheme Rules determined the circumstances in which death benefits may be paid, to whom they may be paid, the conditions they must satisfy, the amount of the benefits, and the way in which decisions about benefits must be taken.
- Rule 11 set out the amount of lump sum death benefit payable but Rule 19.2 set out the provisions for a decision about payment of the benefit to be made. It was the decision about the distribution of the lump sum death benefit which was the subject of Mrs T's complaint. Therefore, 19.2 was the relevant Rule.
- Rule 19.2 provided for the lump sum death benefit to "be paid to the Member's estate and/or be paid or applied to or for the benefit of any one or more of his Dependants, his Relations, the individuals entitled under his will to any interest in his estate and the persons mentioned in a statement of wishes form as described in Rule 19.2.3 who are living at this death, in such shares and in such manner as the Trustees shall decide".
- In the Adjudicator's view, the term "and/or" in Rule 19.2 meant that the lump sum could be paid to any one or more of the following:-
 - The member's estate;
 - A Dependant;
 - A Relation;
 - An individual entitled under the member's will to an interest in his estate; or
 - A person mentioned in a statement of wishes form.
- The latter category of potential beneficiary was added by the April 2015 deed of amendment. Both "Dependant" and "Relation" were specifically defined in the Rules (see paragraphs 11 and 12 above).

- Mrs T had suggested that the wording of Rule 19.2 prior to the April 2015 amendment (see Appendix) meant that, if there was no will, the lump sum would automatically be paid to the member's estate. However, the wording of Rule 19.2 differs pre and post April 2015, only in the addition of the category of "persons mentioned in a statement of wishes form" as potential beneficiaries. The key phrase "be paid to the Member's estate and/or be paid or applied to or for the benefit of any one or more of" [emphasis added] was the same in both versions. In the Adjudicator's view, the April 2015 amendment had no effect on the outcome of Mrs T's case. It was never the case that a lump sum would automatically be paid to a member's estate.
- Mrs T had referred to the wording of the annual benefit statement. This said: "Your dependants or estate will receive a lump sum". The Adjudicator agreed that this was not a completely accurate reflection of the terms of Rule 19.2.1; inasmuch as it implies an either/or decision between the member's estate and his dependants. However, she was not of the opinion that it could have been taken to mean that, in the absence of a will, the lump sum would automatically be paid to the member's estate. There was no mention of a will in the benefit statement.
- The decision as to which of the potential beneficiaries shall receive a share of the lump sum death benefit was for the Trustees to make. This involved the exercise of the Trustees' discretion. The fact that payment of the lump sum death benefit was at the discretion of the Trustees limited the extent to which the Ombudsman could interfere with the decision. If the Trustees had followed certain well-established principles in reaching their decision, neither the Courts nor the Ombudsman may interfere with the decision⁴. Those principles were that the Trustees must:
 - take all relevant matters into account and ignore any irrelevant matters;
 - ask themselves the right questions;
 - direct themselves correctly in law; in particular, they must interpret the Scheme rules correctly; and
 - not come to a perverse decision.
- In this context, 'perverse' meant a decision which no reasonable decision-maker could have come to on the basis of the facts of the case.
- Before deciding how to exercise their discretion, the Trustees were required to identify the potential beneficiaries. The Trustees were not under an obligation to specifically identify every possible individual who might fall within the range of potential beneficiaries; the obligation was to undertake reasonably sufficient enquiries and gather adequate information. The Trustees, in this case, began by

⁴ *Edge v the Pensions Ombudsman* [1999] 4 All ER 546

having the Scheme administrators issue an information form. Mrs T completed such a form in May 2016. A further information form was completed by Mr T's children in July 2016.

- The Adjudicator considered that the Trustees had taken adequate steps to ascertain the range of potential beneficiaries. Having reviewed the information form issued to Mrs T and Mr T's children, she was of the view that the forms adequately provided for information regarding Mr T's Dependents and Relations to be gathered. In addition, the form allowed Mrs T to notify the Trustees that there was no will. The Trustees had also ascertained that Mr T had completed an expression of wishes in 2009.
- Once the Trustees had identified the potential beneficiaries, they were then required to exercise their discretion to decide to whom the lump sum death benefit should be paid.
- The Trustees did not have to pay benefits to every one of the potential beneficiaries or pay each beneficiary equally. Provided that they had followed the principles referred to earlier, they were permitted to prefer the interests of some beneficiaries over others. Mrs T had suggested that the Trustees showed bias towards one group of beneficiaries. The Adjudicator said she took her to mean Mr T's children. Mrs T had cited correspondence from the Scheme's administrators to the children which suggested that the Trustees' decision was unlikely to change on review. In the Adjudicator's view, the evidence did not indicate any bias on the part of the Trustees.
- All of the potential beneficiaries identified by the Trustees had been given an equal opportunity to provide information in support of their claim to the benefit. The correspondence in question did not come from the Trustees. Mrs T had suggested that it was issued on the instruction of the Trustees but there was no evidence to support this assertion. It was, however, inappropriate for the Scheme administrators to anticipate the Trustees' decision in this way and it was something the Trustees might wish to clarify with them going forward. The Adjudicator did not consider the correspondence to have had any effect on the outcome of the Trustees' review.
- One of the specific obligations on the Trustees was to consider all relevant information and ignore any irrelevant information. The matters which a decision-maker must take into account will vary. Whether or not something is relevant will depend upon the facts of the case. A decision-maker must consider any obviously relevant matters.
- Mrs T had suggested that the Trustees failed to consider all the relevant information. In particular, Mrs T was of the view that the Trustees failed to take proper account of:-
 - The mortgage questionnaire completed in 2014.

- The similarities between Mr T's circumstances and intentions in 2006 and his circumstances in 2015.
- Funeral costs, probate costs and Mr T's outstanding debts.
- Witness statements.
- The fact that Mr T's children were not financially dependent on him.
- Mr T's grandchildren.
- Mrs T had also suggested that the Trustees had taken irrelevant information into account. In particular, Mrs T was of the view that the Trustees should not have taken the following into account:-
 - The financial circumstances of the potential beneficiaries, other than for the purposes of establishing dependency.
 - The fact that she was in receipt of a spouse's pension.
 - The 2009 expression of wishes.
 - The children's views on the distribution of Mr T's personal possessions and his ashes.
- The minutes of the Trustees' meeting on 10 January 2018 (the **Minutes**) recorded that they had reviewed all the evidence, including specifically a copy of the mortgage questionnaire, invoices relating to funeral costs and a character statement. The Minutes also recorded that the Trustees had reviewed notes of the meetings with Mrs T and Mr T's children on 18 December 2017. With regard to funeral costs, the Minutes recorded that the Trustees had considered whether these should be met out of the lump sum and decided that a separate payment should not be made.
- With regard to Mr T's financial circumstances and those of the potential beneficiaries, the Trustees had taken legal advice as to whether these should be taken into account. The Minutes recorded that the Trustees had been advised that these were relevant matters. In the Adjudicator's view, this included the fact that Mrs T would be in receipt of a spouse's pension.
- The Minutes recorded that the Trustees had considered whether they required a more detailed financial assessment as to which of the potential beneficiaries was "more financially deserving". They had decided that the evidence before them indicated that Mrs T, Mr T's children and his grandchildren would all benefit from the money. The Minutes also recorded that the Trustees had taken the view that the grandchildren were the responsibility of their parents and that including them might prejudice those without children.
- The Minutes recorded that the Trustees had considered the fact that no expression of wishes later than the 2009 one had been found. They had also

considered Mr and Mrs T's marriage to be a significant development subsequent to his completion of the 2009 expression of wishes. The Trustees had considered the evidence relating to Mr T's discussions with the mortgage provider and his decision not to purchase life cover. They had noted that they were not bound by the expression of wishes and had decided it would be "perverse to stick rigidly to the expression of wish" in the circumstances.

- The Trustees had not referred to the expression of wishes completed by Mr T in 2006. Mrs T had suggested that the Trustees should have considered the earlier expression of wishes because of a similarity between Mr T's circumstances in 2006 and 2015. She suggested that this would have given the Trustees an indication of what his intentions were in 2015; namely to provide for her as his wife. Arguably, Mr T's actions in 2006 might have suggested what his wishes might have been in 2015. However, the fact remained that the Trustees were not bound by any expression of wishes and they had considered other evidence which gave them an indication of Mr T's thinking in 2014/15.
- With regard to the parties' view on the distribution of Mr T's personal possessions and his ashes, the Minutes recorded that the Trustees "recognised that it was not their place to negotiate a settlement" or to be otherwise involved.
- In the Adjudicator's view, the Minutes indicated that the Trustees had considered the relevant matters referred to by Mrs T. The financial circumstances of the potential beneficiaries and Mrs T's spouse's pension were also relevant matters and it was appropriate for the Trustees to consider these. The Minutes also indicated that the Trustees had recognised that they were not bound by the 2009 expression of wishes and that Mr T's circumstances had changed since he completed it. They also recognised that the parties' views as to the distribution of Mr T's personal possessions was not a relevant matter.
- Mrs T might disagree with the weight which the Trustees gave to some of these matters, but this was for the Trustees to decide. The Adjudicator acknowledged that Mrs T might have placed greater weight on some of the evidence, such as the mortgage questionnaire. However, in her view, this would not be grounds for finding that the Trustees had not reached their decision in a proper manner.
- In the Adjudicator's view, the Trustees had adopted the correct interpretation of Rule 19.2.1. The steps taken by the Trustees to identify potential beneficiaries indicated that they asked themselves the right questions; namely, whether the various claimants satisfied the conditions to be considered potential beneficiaries. Mrs T had suggested that the Trustees should have considered Mr T's costs and debts first. However, the Scheme Rules did not require the death in service lump sum to be used to clear a member's debts.

There was no requirement for the Trustees to prioritise this over the claims of the potential beneficiaries.

- The Adjudicator then considered whether or not the Trustees' decision could be considered perverse. There will generally be a range of decisions which would not be considered perverse and which could be reached by trustees when faced with any particular choice. Some of those decisions or outcomes might be more favourable to some beneficiaries than to others. The Ombudsman's role was not to substitute his own decision for that of the Trustees. The fact that the Trustees had chosen one option rather than another would not be enough to render their decision perverse, even if the Ombudsman would not have reached the same decision himself.
- In the Adjudicator's view, the evidence did not support a finding that the Trustees' decision could be said to be perverse. It was within the range of possible decisions which a reasonable decision-maker could have reached on the facts of the case. Whilst the Trustees had been presented with evidence which indicated that Mr T had not opted to take out life cover when re-mortgaging his house, this did not bind them to awarding Mrs T the whole of the lump sum. Even if Mr T had submitted a revised expression of wishes indicating that this was his preference, the Trustees would not have been bound by it. The Trustees were required to consider all of the potential beneficiaries and all of the relevant evidence; regardless of any expression of wishes.
- Mrs T had raised a number of other issues not directly related to the exercise of the Trustees' discretion. These were:-
 - Information provided for her husband was misleading.
 - The Trustees failed to engage proactively with her.
 - The Trustees took an unduly long time to reach a decision.
 - There had been a lack of transparency.
 - A lack of robust administration.
- The information Mrs T was referring to was provided in Mr T's annual benefit statement and the Scheme members' booklet. The annual benefit statement said: "Your dependants or estate will receive a lump sum". The Scheme members' booklet (see Appendix) did not say who a lump sum death in service benefit could be paid to. It did say that the Trustees would make the final decision as to who should receive the benefit and that they would take the member's wishes into account. Mr T would also have known this from previously completing an expression of wishes. The expression of wishes form stated it was not binding on the Trustees.

- Mrs T had suggested that her husband would have assumed that the death in service lump sum would be paid to his estate in the absence of a will. She had suggested that, as a result, he may have thought it unnecessary to update his expression of wishes.
- In the Adjudicator's view, the information in the annual benefit statement and members' booklet was unhelpful. The information provided was correct but lacking in detail; in particular, there was no clear information about potential beneficiaries of the lump sum death in service benefit. However, the members' booklet and the expression of wishes form did make it clear that it would be the Trustees who decided who should receive the lump sum death benefit. Mr T would have known, from having completed previous expressions of wishes, that he could ask the Trustees to pay it to Mrs T. There is nothing in the available information which suggested that the lump sum would be paid to the member's estate automatically.
- Mrs T had said the Trustees had failed to engage with her in a proactive manner. Her particular concerns appeared to be about the 2016 benefit statement and the Trustees' rationale for their decision.
- The Trustees had explained that they were unable to provide Mrs T with a copy of a 2016 benefit statement for Mr T because one was not produced. The Adjudicator said, in her experience, annual benefit statements were usually produced on the basis of a calculation date a few months prior to the date of publication. For example, the benefits might be calculated by reference to 1 April and published in the following June. This was to enable the scheme administrators to gather and check the data for the membership. It was not unusual for statements not to be produced for members who had died in the interim period. She said she had no reason to think that the Trustees were withholding a 2016 statement for Mr T; it was simply the case that one was not produced.
- With regard to the Trustees' rationale for their decision, the Adjudicator noted that Mrs T was sent a copy of the Minutes. Having reviewed a copy of the Minutes, the Adjudicator was of the view that they provided adequate explanation for the Trustees' decision. She was also of the view that providing a copy of the Minutes demonstrated that there was transparency in the Trustees' decision-making.
- Although the investigation and Opinion related to the Trustees' 2018 decision, the Adjudicator said she had reviewed the decision-making process as a whole. She acknowledged that it was a little under two years between Mr T's death and the Trustees paying the lump sum. However, she said she had not identified any periods of inappropriate inactivity on the part of the Trustees. The Adjudicator did not consider that the time taken for the Trustees to reach their 2018 decision amounted to maladministration on their part.

- Mrs T had made the point that there was no system in place to acknowledge receipt of an expression of wishes. Had such a system been in place and Mr T had submitted an updated expression of wishes, he would have been alerted if it had gone astray in the post.
 - The Adjudicator said there was something to be said for having a policy of acknowledging receipt of updated information from members. That being said, there was no requirement for the Trustees to have such a system in place. Equally, had Mr T submitted an updated expression of wishes as an alternative to taking out life cover for his mortgage, it might have been prudent for him to have checked that it had arrived safely. As it stood, there was no evidence that Mr T had completed an expression of wishes in 2014 or later.
 - Mrs T had mentioned that she did not have copies of the documents collected by the Company from her home and her requests to conduct a search had not been granted. The Trustees had explained that the Company was asked whether there were any personal documents amongst those collected. The Adjudicator did not consider that the Trustees were required to do any more than this. The Company was entitled to collect its paperwork and it was for the Company to decide how to respond to Mrs T's request for access.
19. Mrs T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs T provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs T for completeness.

Ombudsman's decision

Oral hearing

20. I will begin with Mrs T's request that I hold an oral hearing. I have the power to hold an oral hearing under the procedural discretion contained in Section 149(4) of the Pension Schemes Act 1993. However, I tend not to exercise my discretion unless I am of the view that a complaint cannot adequately and appropriately be determined without me hearing directly from the parties. For example, I might require clarification of the parties' statements or there is some ambiguity in the evidence presented to me.
21. Section 146(2) of the 1993 Act requires complaints to me to be made in writing. I therefore begin by considering whether I am able to determine a complaint on the basis of the written submissions. In Mrs T's case, both parties have been afforded ample opportunity to provide written submissions, together with copies of any documents they wish me to consider. I have before me a comprehensive bundle of documents submitted by Mrs T, together with further papers provided by the parties at various dates. I have concluded, therefore, that there is little to be gained by holding an oral hearing. The evidence I require in order to determine Mrs T's

complaints is adequately provided within the written submissions I have been presented with.

22. I have decided not to hold an oral hearing in this case.

Distribution of the Lump Sum Death Benefit

23. The starting point for any case concerning the payment of benefits under an occupational pension scheme is the scheme's rules. In Mrs T's case, the relevant Rule is 19.2. I think it is worth setting out the relevant terms of Rule 19.2 again.

24. Rule 19.2 states:

“Payment of lump sums on death

19.2.1 Any lump sum which is expressed to be payable under Rule 19.2 shall within the period of two years commencing on the date of the Member's death be paid to the Member's estate and/or be paid or applied to or for the benefit of any one or more of his Dependants, his Relations, the individuals entitled under his will to any interest in his estate and the persons mentioned in a statement of wishes form as described in Rule 19.2.3 who are living at this death, in such shares and in such manner as the Trustees shall decide.

...

19.2.3 In exercising their discretion under this Rule the Trustees may take account of, but shall not be bound by, any wishes of the Member as expressed in a statement of wishes form received by the Trustees before the death of the Member and not revoked by the Member ...”

25. Rule 19.2.1 clearly provides for the lump sum death benefit to be paid to the member's estate **and/or** any one or more of his Dependants, his Relations, individuals entitled under his will to any interest in his estate and persons mentioned in a statement of wishes form. Since he did not leave a will, the potential beneficiaries in Mr T's case are:

- his estate;
- his Dependants;
- his Relations; and
- persons mentioned in an expression of wishes.

26. The Scheme Rules define who may be considered a Dependant and who may be considered a Relation (see paragraphs 11 and 12). Mrs T and her barrister have made the point that Mr T's children do not meet the definition of Dependant. In

particular, they have argued that the children were not financially dependent upon Mr T. The evidence supports this. However, Mr T's children did not need to be financially dependent upon him in order to qualify as potential beneficiaries under Rule 19.2. This is because they qualified as Relations. They also qualified as "persons mentioned in a statement of wishes form". The Trustees were quite correct in considering Mr T's children as potential beneficiaries of the lump sum death benefit.

27. I note that Mrs T has queried why Mr T's grandchildren did not receive a share of the lump sum. Under Rule 19.2, they do qualify as potential beneficiaries being descendants of Mr T's grandparents. The Minutes show that the Trustees did consider Mr T's grandchildren. They considered them to be the responsibility of their parents, and that to include them as beneficiaries might prejudice beneficiaries without children.
28. Trustees are not obliged to distribute part or any of a lump sum death benefit to each and every potential beneficiary. They may choose and prefer some beneficiaries over others; provided that, in coming to a decision, they follow the relevant principles.
29. Having identified the potential beneficiaries, it was then for the Trustees to decide how to distribute the lump sum among them. Rule 19.2 makes it clear that this distribution shall be "in such shares and in such manner as the Trustees shall decide". It is a discretionary power vested in the Trustees. The extent to which I may interfere in the Trustees' decision is limited. I may not exercise the discretion myself. I may only remit the decision for the Trustees to reconsider if, and only if, I find that they failed to follow the required approach; namely, to:
 - take all relevant matters into account and ignore any irrelevant matters;
 - ask themselves the right questions;
 - direct themselves correctly in law; in particular, they must interpret the Scheme Rules correctly; and
 - not come to a perverse decision.
30. I find that the Trustees correctly interpreted the Scheme Rules; in particular, that they identified the correct potential beneficiaries. I find that the Trustees asked the right question; that is, what would be an appropriate way in which to distribute the lump sum death benefit amongst the potential beneficiaries.
31. Although she has questioned their interpretation of the Scheme Rules, Mrs T's complaint is principally that the Trustees failed to take all relevant matters into account, took irrelevant matters into account and came to a perverse decision. Mrs T has provided a detailed analysis of those factors which she considers the Trustees failed to take into account. Likewise, she has provided details of the factors which she considers they should not have taken into account. These are summarised below:-
 - Mrs T considers that the Trustees failed to take account of:-

- The mortgage questionnaire completed in 2014. She considers that this demonstrates that her husband's intentions as to the future treatment of his death in service lump sum changed in November 2014.
 - The similarities between Mr T's circumstances and intentions in 2006 and his circumstances in 2015.
 - Mr T's actions at the time of his divorce. She considers that these demonstrated that he carried out his responsibilities to his former wife by ensuring mortgage payments were made.
 - Funeral costs, probate costs and Mr T's outstanding debts.
 - Witness statements as to Mr T's intentions.
 - The fact that Mr T's children were not financially dependent on him.
 - Mrs T considers that the Trustees should not have taken the following into account:-
 - The financial circumstances of the potential beneficiaries, other than for the purposes of establishing dependency.
 - The fact that she was in receipt of a spouse's pension.
 - The 2009 expression of wishes.
 - The children's views on the distribution of Mr T's personal possessions and his ashes.
32. Mrs T submits that her husband's financial circumstances was a relevant factor but the Trustees did not give it the importance it required. She considers that the Trustees placed too much focus on those who were not dependent on her husband instead of focusing on "the correct dependent spouse". She also considers that the Trustees placed too much emphasis on the children's personal circumstances; in particular an accident suffered by one of his sons.
33. It is important to be clear that there is a distinction to be drawn between failing to take relevant matters into account and giving some relevant matters less weight than others. The weight which is given to any of the relevant evidence is for the Trustees to decide, including giving some of it very little or no weight at all⁵.
34. The evidence indicates that the Trustees did consider all of the relevant matters which Mrs T has suggested they failed to take account of. For example, there is reference to them in the minutes of the meeting on 18 January 2018. The reality of the matter is that Mrs T disagrees with the weight which was given to certain factors; such as, the mortgage questionnaire and her witness statements.

⁵ *Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

35. With regard to the matters which Mrs T suggests should not have been taken into account, I would agree that children's views on the distribution of Mr T's personal possessions and his ashes was not relevant to the Trustees' decision. However, the evidence does not indicate that they took this into account when making their decision about the lump sum death benefit. The January 2018 minutes recorded that the Trustees did not wish to become involved in a discussion about Mr T's ashes. The minutes recorded that the Trustees simply decided to encourage Mrs T and the children to engage on such matters. I do not find that this amounts to taking irrelevant matters into account.
36. The other matters which Mrs T has drawn to my attention I consider to be relevant to the Trustees' decision; that is the 2009 expression of wishes and the potential beneficiaries' financial circumstances, including Mrs T's pension.
37. I note that the Trustees discussed at some length, the 2009 expression of wishes form and the fact that a more up-to-date form had not been found. They ultimately decided that it would be perverse to stick to the 2009 expression of wishes form in the circumstances. Rule 19.2.3 specifically provides that the Trustees shall not be bound by an expression of wishes by a member. The Scheme literature said that the Trustees would always take the member's wishes into account. This is not the same as saying that they would always implement the member's wishes, which would be contrary to Rule 19.2.
38. There has been much discussion as to Mr T's intentions with regard to the lump sum death benefit. It is worth bearing in mind that, whatever Mr T's intentions might have been, he could not bind the Trustees to pay the lump sum in any particular way. Even if he had completed a new expression of wishes form in 2014, as Mrs T has suggested, this would not have been binding on the Trustees. They would still have needed to go through the same decision-making process, taking all relevant matters into account. The fact that Mr T had apparently intended to rely on the Scheme's death in service provisions instead of taking out life cover for his mortgage was just one of the relevant factors for the Trustees to consider. The evidence indicates that they did so by considering the mortgage questionnaire supplied by Mrs T.
39. I note the concern which has been raised as to what have been described as attempts to influence the Trustees' decision and to create what might be considered a negative view of Mrs T. I acknowledge that the examples provided by Mrs T are likely to have caused her some distress. So far as my jurisdiction is concerned, I may only consider whether such matters had any improper effect on the Trustees' decision. They are irrelevant matters for the purposes of the Trustees' decision. The Trustees were clearly aware of what was being said by various parties, but the evidence indicates that they did not allow this to have any influence on their decision.
40. It remains for me to consider whether the Trustees' decision can be considered to be perverse. A perverse decision is one which "no trustees properly advising themselves

of all the relevant circumstances could have reasonably so concluded”⁶. This is quite a high benchmark.

41. There is usually a range of decisions which might reasonably be reached by trustees tasked with distributing a lump sum death benefit. It is irrelevant whether or not I might have reached the same or a different decision. The question is whether or not the Trustees’ decision falls within that range of reasonable decisions. I find that it does.
42. I note the reference to a previous Ombudsman’s determination, *K00663*. Whilst I aim for consistency across decisions, previous Ombudsman’s decisions do not set precedence in the same way as decisions by the Courts. In any event, to my mind, the reference to payment of a lump sum to a surviving spouse being justified was not intended to exclude sharing a lump sum with other beneficiaries. To try and read any more into the statement would be to restrict trustees’ options in a way which is inconsistent with their discretion.
43. I note also the reference to *Brewster*. This case concerned the non-payment of a spouse’s pension to an unmarried partner under the terms of a public-sector pension scheme. The decision rests very much on the facts of the case and it is not clear that the same arguments could be made in a case relating to a trust based private sector pension scheme. I do not find that it assists Mrs T’s case in any way.
44. I find that there are no grounds on which I should ask the Trustees to reconsider their decision as to the distribution of the lump sum death benefit.
45. Mrs T has suggested that the information available to Mr T led him to believe that he did not need to update his expression of wishes form in 2014. Mrs T is also of the view that the 2012 Scheme booklet did not reflect the terms of the 2006 Trust Deed and Rules. I find that the information provided for Mr T was limited but not incorrect. It would have been helpful if the Scheme booklet had contained more information about potential beneficiaries of a lump sum death benefit. However, I do not find that it is possible to say that the available information suggested the lump sum would be paid to Mr T’s estate automatically. The 2012 booklet clearly stated that the Trustees would make the final decision as to who would receive the lump sum.
46. In any event, I do not find that the fact that Mr T did not update his expression of wishes in 2014 has affected the outcome of the Trustees’ decision making. As I have already said, any expression of wishes he might have submitted would not have been binding on the Trustees.
47. Mrs T has complained that the Trustees failed to inform her of an option to substitute a lump sum for the spouse’s pension. This did not form part of Mrs T’s original complaint; nor has she raised it with the Trustees as yet. I have not, therefore, considered this matter any further as part of Mrs T’s current complaint. Nor have I

⁶ *Stephens v Michelin Pensions Trust Ltd* [2006] All ER (D)

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considered the concerns raised in connection with Mrs T's subject access requests;
this falls outside my jurisdiction.

48. In conclusion, I do not uphold Mrs T's complaint.

Anthony Arter

Pensions Ombudsman
13 November 2019

Appendix

Scheme booklet May 2012

“Expression of wish forms

So that the lump sums payable on your death can be paid free of inheritance tax, the Trustees make the final decision over who should receive these benefits. However, they always take your wishes into account and so you should use the expression of wish form at the back of this guide to let them know what your wishes are. **You should keep this form up to date if your circumstances change (for example if you get married or divorced or if your civil partnership is dissolved or if you have children). You can get new forms from the HR department.”**

Rule 19.2.1 prior to the April 2015 amendment

“Payment of lump sums on death

19.2.1 Any lump sum which is expressed to be payable under Rule 19.2 shall within the period of two years commencing on the date of the Member’s death be paid to the Member’s estate and/or be paid or applied to or for the benefit of any one or more of his Dependants, his Relations and the individuals entitled under his will to any interest in his estate who are living at this death, in such shares and in such manner as the Trustees shall decide ...

...

19.2.3 In exercising their discretion under this Rule the Trustees may take account of, but shall not be bound by, any wishes of the Member as expressed in a statement of wishes form received by the Trustees before the death of the Member and not revoked by the Member ...”