

**PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN**

Applicant	Mr Paul Crossan
Scheme	Unipart Group Pension Scheme (the Scheme)
Respondent(s)	The Trustees of the Scheme (the Trustees)

Subject

Mr P Crossan's complaint is that the decision that the Trustees of the Scheme reached at their meeting on 12 October 2011, following a Determination by the Deputy Pensions Ombudsman on 16 September 2011, was improper.

The Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against the Trustees as it was reasonable for them to decide that Mr P Crossan did not meet the definition of Beneficiary and so could not qualify for the payment of a lump sum.

DETAILED DETERMINATION

The previous Determination

1. On 16 September 2011, Jane Irvine, the Deputy Pensions Ombudsman determined a complaint by Mr Crossan (under our reference 82784/1). Mr Crossan complained that the Trustees had wrongly paid the death benefit in relation to his late father's death benefit to a Ms A and also that the Trustees' handling of his complaint was inadequate.
2. The Deputy Pensions Ombudsman concluded that insufficient enquiries had been made before coming to a decision. She directed that:

“Within 28 days of the date of this Determination the trustee shall take its decision afresh, exercising its discretion in accordance with the Scheme Rules and disregarding that a payment has already been made. It shall then convey its decision to Mr Crossan in writing, giving reasons.”

Rules

3. In relation to death benefits the Scheme's Rules say:

“...the Trustees shall have power (in their absolute discretion to be exercised within 2 years of the member's death):-

 - (a) to pay or apply the whole or any part of the sum to or for the benefit for all or any one or more of the deceased Members' Beneficiaries in such shares and proportions as the Trustees shall in their absolute discretion decide, save that where a Member's Beneficiary is not a Dependant of the member, the consent of the Principal Employer shall be required for any payment under rule 5.1 of this Appendix to that Beneficiary; or
 - (b) to retain all or any part of the sum as part of the assets of the Scheme.

The Trustees in exercising their discretion to pay or apply the sum may have regard to but shall not be bound by any expression of wishes from the Member regarding the disposal of any sum ...”

4. “Beneficiaries” is defined in the Scheme Rules as:
- “(a) a Dependant of the member; or
 - (b) the Member’s Surviving Spouse: or
 - (c) an individual, company or body nominated as a beneficiary by the member in writing to the Trustees; or
 - (d) an individual in respect of whom the Trustees record in writing (within 6 months after the date of the Member’s death) that he is, in the Trustee’s opinion, a person for whom the Member was under a moral obligation (with or without also a legal obligation) to make financial provision; or
 - (e) any person or body entitled under any testamentary disposition of the deceased Member admitted to probate.”

5. “Dependant” is defined as follows:

““Dependant” means a person who is financially dependent upon the Member or dependent on him because of disability or who was so dependent at the time of the Member’s death or retirement and who in the opinion of the Trustees ought to receive a benefit under the Scheme in the event of the Member’s death whether or not the Member notified the Trustees that he wished that person to be considered as a recipient of such a benefit.”

My approach to this case

6. The only basis on which Mr Crossan can complain to me is that at least some of the death benefit should have been paid to him. (Strictly he does not represent his brother, though it is also his view that his brother was a proper recipient.) I cannot entertain an independent complaint from Mr Crossan that Ms A should not have received the benefit. That is a secondary question that I can only consider if the Trustees ought to have considered him as a potential recipient alongside or as an alternative to Ms A. If they have rightly concluded that he did not fall in the class of beneficiaries as defined then I can go no further. So I concentrate below on the facts and submissions that relate to that matter.

Material Facts

7. Following the determination of Mr Crossan's original complaint the Trustees met to make a fresh decision on the matter. That meeting was on 12 October 2011 and a Trustee paper given to the Trustees said:

"...Mr Crossan died in service...In brief he died leaving two grown up sons and a lady he lived with [Ms A]. [Ms A] and his elder son have [sic] presented two different versions of his personal situation. Our research with his work colleagues supports the position presented by [Ms A]. The options are:

- 1) Pay the benefit to [Ms A] as his dependent.
- 2) Decide one or more of the three potential beneficiaries were individuals in respect of whom the member was under a moral obligation to make financial provision for (and split the payment as may be decided).
- 3) Retain all or part of the benefit.

We have not put forward any conclusion to the paper or made a recommendation. We have left these for the Trustee Board to decide at this meeting...

3. Potential Beneficiaries and Information

[The definitions of "Beneficiaries" and "Dependant" in the rules of the Scheme were set out]

Working through the definition of "Beneficiaries", the potential recipients under each case are as follows:

- (a) Dependant. This is potentially the lady with whom he was living – [Ms A]. See below.
- (b) Surviving spouse. None.
- (c) Nominated Beneficiary(ies): We have no nomination form.
- (d) Individuals in respect of whom the member was under an obligation: potentially the lady with whom he was living ([Ms A]) and/or his two sons, Paul and [Mr Crossan's brother]. See below.
- (e) Entitled under a Will. He did not leave a Will.

4. Other Relatives

[Details were given for Mr Paul Crossan and his brother, aged 32 and 29 respectively.]

...

7. Analysis

Lump Sum – Beneficiaries

There are three potential Beneficiaries.

[Ms A]. She appears to be his partner. The extent of her financial dependence is unclear. George presented her as his fiancée. He was living at her address when he died and it appears that he had been doing so for 18-24 months before his death.

Paul Crossan. His elder son. He has confirmed he was not financially dependent on his father. It is open for the Trustees to form the opinion that he could be regarded as someone the member was under a moral obligation to make financial provision for. He lived at a separate address.

[Mr P Crossan's brother]. His younger son. According to Paul, [his brother] was not dependent on their father. Again it is open for the Trustees to form the opinion that he could be regarded as someone the member was under a moral obligation to make financial provision for. He lived at a separate address and has not been contacted through this process.

8. Conclusion

Lump sum £55,461

This case is presented for consideration at the Trustee board meeting with no recommendation as to the distribution (or retention) of this benefit.”

8. The Trustees also had before them the following material:

- The Deputy Pensions Ombudsman's Determination dated 16 September 2011.
- A copy of the Rules of the Scheme.

Minutes were made of that meeting. In particular they said:

“The Board unanimously agreed that there was no evidence of dependency of the two sons and they were not of the opinion that the member was under a moral obligation to make financial provision for them.”

9. On 25 October 2011 a letter was sent to Mr Crossan regarding the Trustees' decision. They said that this decision was made based on all the evidence that they now had in relation to him, his brother and Ms A. The Trustee Board considered whether any of the three were potential beneficiaries under the definition of Beneficiary. They looked in particular at the definition of Dependent and whether their father was under a moral obligation to provide for them. They

decided that there was no evidence that Mr Crossan and his brother were dependent on the late Mr Crossan or that he was under a moral obligation to provide for them. As such they were not beneficiaries under the terms of the Scheme.

10. Mr Crossan wrote to the Trustees raising a dispute on 4 July 2013. He said that the Trustees had failed to take the decision afresh disregarding that a payment had already been made. They had also failed to correctly identify and factually qualify the beneficiaries as set out in the Rules and failed to use all information available to them.
11. A brief response from the Secretary to the Trustees said that they had considered the complaint and found it unfounded, adding that they had abided by the directions given to them in the Ombudsman's Determination.

Summary of Mr Crossan's position

12. There has been a failure to identify the correct beneficiaries. The Trustees did not have the freedom to "decide" whom they would like to be a beneficiary. Their task was to factually establish, rather than hypothesise, who the beneficiaries were according to the Rules. They have had five years to decide whether anyone was financially dependent/interdependent on his father. As they have not managed to do so in this length of time it was clear that no-one qualified in this category of beneficiary.
13. There had been a failure to take a fresh decision and there was use of irrelevant evidence. The Deputy Pensions Ombudsman had said that Ms A was "unlikely to qualify for the death benefit" and the essence of her determination was that the Trustees should not have paid death benefits on the basis of such limited or contradictory evidence. He also made additional observations about the basis of the Trustees' decision to pay the benefit to Ms A.
14. The Trustees had not contacted him during the process of the supposedly "fresh" decision and have not contacted his brother whatsoever since the death of his father.
15. The Trustees had demonstrated bias, prejudice and conflict of interest. There was a clear conflict of interest from the Trustees' perspective stemming from the fact that they had already paid out the full lump sum payable. This created an obvious financial motivation to self-justify this payment rather than paying the

rightful beneficiaries. The Trustees had been using irrelevant points and ignoring all contrary evidence to back up their original wrong decision and have continued this practice going into the second decision.

16. He and his brother had not been treated as the rightful beneficiaries. Had the decision been taken properly there was no good reason not to have paid them the full benefit. The decision should be taken again with him and his brother as the only established beneficiaries. No other categories of beneficiaries were relevant to the case. Any payment outside of them must be considered unlawful.
17. The Trustees were now fully aware that his father has made a witnessed nomination and that he, his brother and a third party were chosen to receive a benefit – but were unaware of this when they made the decision on 11 November 2008. Mr G, the late Mr Crossan’s manager, had said that he “particularly remembered” the late Mr Crossan completing an expression of wish form (see paragraph 21 of the original determination). Mr G thought that the late Mr Crossan had nominated Ms A and both his sons to receive the death benefit. He had “sworn on oath” that his father had put both he and his brother on the form as chosen beneficiaries. Mr G had said that he had posted the form to the pensions department. The pensions department had admitted that the nomination form had been misplaced and apparently have never followed up as to where it was. This act of neglect had excluded them as rightful beneficiaries. The oath should have been taken into account, in lieu of the actual document itself, when making the second decision making them class (c) beneficiaries. He asks that a copy of the witness statement be provided to him as evidence for purposes of his complaint.
18. Because the form was posted, it should be treated as having arrived, following the rule in *Adams v Lindsell* (1818) and subsequent cases.
19. On 1 December 2008 a telephone call from Ms A to Unipart’s pension team was made. The notes revealed that she confirmed that the late Mr G Crossan told her he had completed a nomination form and that Mr Paul Crossan and his brother were on that form. The note of the call with Ms A said:

“...She referred to fact [*sic*] that George has said he completed a form for her and his two sons...”

20. His understanding is that as his father was domiciled in Scotland, he was bound to pre-existing legal obligations under Succession (Scotland) Act 1964. Under this act, the children of the deceased have “legal rights” to provision and these apply in every case, be it testate or intestate. Therefore under Scottish law he and his brother should qualify as beneficiaries under class (d) as their father had a moral obligation (to comply with his legal duty) to make financial provision for his children.
21. He had provided an “Information on Relatives” form to the Trustees in March 2009 at the time of his original complaint. They had never asked his brother to complete such a form.
22. On 1 September 2009, as part of the Trustees’ investigations, Unipart’s Security Director was sent to his home to interview him. During this he explained to the Security Director the details of his father’s personal life. All of these interview notes with the information he gave are completely absent from the Trustee Paper. He questions why this information is being held back.
23. Mr Crossan has also given my office a number of details about his personal relationship with his father since his childhood. As a result of the nature of the relationship he considers that his father had both a moral and probably legal obligation in terms of maintenance debt to the family. The relevant information was he says given to the security officer who interviewed him.

Summary of the Trustees’ position

24. In relation to the allegation from Mr Crossan regarding his father’s nomination form the Deputy Pensions Ombudsman had concluded that the Trustees had no alternative but to proceed on the basis that the late Mr Crossan did not nominate anyone to receive the lump sum.
25. The late Mr Crossan’s manager, Mr G, was not on oath in relation to a nomination form. He had provided a witness statement to their security officer. In any event the previous Determination said that the Trustees had no alternative but to proceed on the basis that the late Mr Crossan did not nominate anyone to receive the lump sum. Nothing has changed that position since the Determination was made. Also it was not accurate to say that the pensions department had admitted that a nomination form had been misplaced – there was no such admission.

26. In the earlier Determination the Deputy Pensions Ombudsman had concluded that the Trustees should make their decision again, having regard to all the information that they now had. Consequently no further investigations were made.
27. Mr Crossan did not fall into any of the categories for a beneficiary. In the absence of a nomination form in favour of him and/ or his brother it would require the Trustees to form the opinion that they were a person for whom the member was under a moral obligation (with or without also a legal obligation) to make financial provision. This was not the Trustees' opinion and hence Mr Crossan and his brother are not Beneficiaries in accordance with the Rules.
28. The term "moral obligation" was not defined under the Rules and they have not taken legal advice on this Rule. The Trustees' approach and understanding of the term "moral obligation" is that it is used in accordance with its natural meaning and all individual cases are considered on their own merits.
29. They could not find any wording in the Deputy Pensions Ombudsman's determination that said that Ms A was "unlikely to qualify for the death benefit", as has been put forward by Mr Crossan.
30. While it was the Secretary to the Trustees' decision to involve the company's security department this was in response to Mr Crossan's allegation of fraud against the Scheme, which they took very seriously. The approach to the investigation was left to the security team and a number of people were interviewed. Rather than evidence of fraud the security team found strong evidence of a consensual relationship between the deceased and Ms A. This was taken into account when the matter was considered afresh on 12 October 2011. Given that no evidence of fraud was found it was not considered appropriate to present these meeting notes to the Trustees.
31. They deny any bias or prejudice when revisiting the matter. Throughout the process Mr Crossan's allegations have been carefully examined against the evidence and a thorough review of all matters has been undertaken by the Trustees on a number of occasions. Moreover the Trustee Board includes an independent trustee, who endorsed the conclusion of the Board, as well as representatives from both management and staff levels. They were particularly clear that Mr P Crossan and his brother were not financially dependent on their

father at the time of his death. The Determination had been followed fully and completely.

Conclusions

32. The Deputy Pensions Ombudsman remitted Mrs Crossan's case to the Trustees. They were to consider, as if for the first time, the decision about how to distribute the lump sum that arose on the death of Mr G Crossan having regard to all the evidence that had been gained during the dispute process, instigated after their original decision, and to disregard that a payment had already been made.
33. In reaching their decision, the Trustees needed to ask the right questions, interpret the Rules correctly and take into account all relevant matters but no irrelevant matters. They were required to come to a decision that would not be considered perverse, i.e. a decision which no other reasonable decision maker faced with the same evidence would come to.
34. Mr Crossan says that an expression of wish form completed by his late father was not taken into account, referring to the submission from Mr G and the telephone note of 1 December 2008. However the Deputy Pensions Ombudsman concluded that the Trustees had no alternative but to proceed on the basis that the late Mr Crossan did not nominate anyone to receive the lump sum (paragraph 53 of the original Determination). So the existence of Mr G's evidence, originally offered in November 2008 before the first decision was made, and the telephone note would have been largely irrelevant when revisiting the decision.
35. Even if I had thought the Trustees should have re-examined the evidence I do not think it would help Mr Crossan. The question was whether Mr Crossan had been "nominated as a beneficiary in writing to the Trustees". At best the evidence is that the late Mr Crossan had completed a form which included his sons. But unless received that that would not have amounted to a nomination to the Trustees. And on that subject, Mr Crossan is not right to seek to apply the "post-box rule", which relates to a specific element of contract. There is nothing contractual about the nomination of a preferred beneficiary.

36. Clearly Mr Crossan does not fall into the category of a Beneficiary under sub-paragraphs (a), (b), (c) or (e) of the definition. He has himself said that he was not financially dependent on his father and that there was no will.
37. He could therefore only qualify under sub-paragraph (d) as an individual who was in the Trustees' opinion, a person for whom Mr Crossan's father was under a moral obligation to make financial provision. (The Trustees rightly took no issue over the requirement that this qualification strictly only applied if a record was made within six months of death). The Trustees decided that no moral obligation existed in the circumstances. Mr Crossan does not ever seem to have suggested to them directly that it did.
38. Mr Crossan has made some submissions to me that do not appear to have been put to the Trustees. My role is to review the decision making process of the Trustees when they made their decision. They would only be at fault in relation to that information if it was maladministration not to have obtained it before making their decision.
39. For example, the argument put forward in relation to the Succession (Scotland) Act 1964 does not appear to have been put to the Trustees. But even if it had it is, I regret, of no help to Mr Crossan. That act is concerned with, amongst other items, the succession of heritable and moveable property of deceased persons and the administration of deceased persons' estates and other property passing on death. Within that Act is a requirement that where an intestate is survived by children, they shall have right to the whole of the intestate estate. But the discretionary payment from the Scheme would not form part of the member's estate. (Also Mr P Crossan was too old to come under the definition of "child".)
40. Mr Crossan has also made some submissions about the events of his childhood and that these created a moral or possibly legal obligation for his father to make financial provision. It is not clear that the Trustees considered this point exactly, but given that the obligation would have had to exist at the time his father's death, as is expressly specified within the Rules, I do not think it would have been material.
41. So my determination is that the Trustees' conclusion was correct that Mr Crossan was not within the class of "Beneficiary" as described by the Rules. Therefore they could not have paid any part of the benefit to him.

42. It is therefore irrelevant to his case whether they reached a proper decision to have paid it to Ms A, rather than retaining it in the fund (which was the only remaining option assuming that his brother does not have grounds for claiming to be a beneficiary that are stronger than Mr Crossan's). I realise that Mr Crossan strongly feels that the benefit should not have been paid to Ms A, and he may consider that while that issue is unresolved justice has not been done. However I cannot reach any conclusion on the matter because, given that Mr Crossan could not have received the benefit, whether it was paid to Ms A or held within the fund would have made no practical difference to him. I only have power to decide whether the Trustees have made a proper decision to the extent that it may have caused Mr Crossan harm.
43. For the reasons given I do not uphold the complaint.

Tony King
Pensions Ombudsman

5 September 2014