

## Ombudsman's Determination

Applicant	Mrs Y
Scheme	Armed Forces Pension Scheme 2005 ( <b>the Scheme</b> )
Respondents	Veterans UK (formerly known as Service Personnel and Veterans Agency (SPVA))

## Outcome

1. I do not uphold Mrs Y's complaint, and no further action is required by Veterans UK.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs Y complained that the lump sum death benefit payable under the Scheme on her son's death should have been paid to his estate, not to Miss X, and that a dependant's pension should not have been paid by the Scheme to Miss X.

## Background information, including submissions from the parties

4. Mr Y joined the RAF in 2008. Sadly, he was killed while on a joint patrol with the Army in Afghanistan on 12 May 2012. He had completed a will form to leave his estate to his father.
5. Mr Y's girlfriend for about two years, Miss X, was also in the RAF. Mr Y lived in Miss X's flat some of the time before he started his pre-deployment training in 2012.
6. Miss X was named by Mr Y on his "out of area point of contact" form in January 2012, but on the JPA (the Armed Forces' HR computer system) she ceased to be listed as his emergency contact on 17 February 2012. His Personal Information Record listed Miss X as his "girlfriend" rather than "spouse/partner".
7. In the weeks before he died Mr Y and Miss X frequently communicated with each other by post and email, and made phone calls to each other when they could. His last email to her was dated 12 May 2012, the day he died.
8. On 16 June 2012 Mrs Y, the mother of Mr Y, wrote to Veterans UK. She had heard that Miss X was intending to claim death benefits under the Scheme and wanted to make Mr Y's wishes known. Mrs Y said that Mr Y had made both her and Miss X

aware that he did not want Miss X to benefit financially from his death; he would have wanted any money that would arise on his death to go to his parents or to support his nephew and niece's future education costs. Mrs Y also said that Mr Y was independent financially from Miss X, but he had been paying her £150 a month because he kept some of his possessions at her home.

9. Mrs Y was appointed as executor of Mr Y's estate on 21 June 2012.
10. On 7 September 2012 Miss X submitted a claim to Veterans UK for the death benefits payable by the Scheme. After considering the application and the documentary evidence provided, and after seeking policy guidance, Veterans UK decided to award Miss X an adult dependant's pension that was payable under the rules of the Scheme. Veterans UK also awarded Miss X the lump sum death benefit payable under the Scheme. Miss X was informed of these decisions on 9 January 2013.
11. When Mrs Y became aware of these payments, she complained to Veterans UK that it had not engaged with her family in good faith, and had not obtained all relevant evidence and followed the Scheme rules properly before making its decision. Mrs Y also said that Miss X did not satisfy the criteria for payment as an adult dependant.
12. Veterans UK told Mrs Y that some information submitted by her (e.g. that Mr Y had removed Miss X from his next of kin list and designated her on his record as his girlfriend, not partner) was not received by it until 10 December 2012, after its decision about death benefits had been made, but it said that "It is our opinion, however, that the same decision would have been reached even if we had been in receipt of this information. SPVA consider that the information they received in support of the claim justified the decision that was arrived at. There could have been a number of reasons why [Mr Y] decided to take this step, and this information would not have led us to make a different decision."
13. In subsequent correspondence Veterans UK said that Mr Y had not completed the nomination form required in respect of death benefits payable under the Scheme, and that the criteria for assessing claims for substantial partnerships was set out in Joint Service Publication 764 AFPS; Veterans UK was satisfied that Miss X had adult dependant status as she had a substantial relationship with Mr Y, and on the balance of probabilities there was also financial interdependence between them.
14. Mrs Y appealed unsuccessfully to Veterans UK under the Scheme's internal dispute resolution procedure (**IDRP**). At stage 1, the deciding officer's letter of 23 July 2013 said that "I could find no conclusive evidence to lead me to decide that the substantive relationship had ceased or that [Miss X] did not meet the qualifying criteria to be considered a surviving adult dependant under the AFPS rules."

15. At stage 2 of the IDRP, Mrs Y reiterated her view that Miss X did not satisfy the criteria for an adult dependant. Mrs Y also said that some of the evidence from the JPA appeared to have been altered without Mr Y's permission, as she understood that he could not access the JPA from Afghanistan. The stage 2 deciding officer rejected her appeal on 11 February 2014. He said that an email from Mr Y on 26 April 2012 stated he was living with Miss X, so there was evidence of their cohabitation; there was nothing to show that Mr Y and Miss X were not in an exclusive relationship, and evidence received from Miss X was considered sufficient to show their interdependency.
16. Mrs Y complained that Veterans UK had relied on selective evidence provided, and had given little weight to her family's views. She also queried several discrepancies in the JPA records for Mr Y.

### **Adjudicator's Opinion**

17. Mrs Y's complaint was considered by one of our Adjudicators, who concluded that no further action was required by Veterans UK. The Adjudicator's findings are summarised briefly below:
  - Mrs Y's complaint relates to (1) the lump sum death benefit and (2) the dependant's pension payable from the Scheme. Both benefits were paid to Miss X. However, Miss X is not a party to Mrs Y's complaint. The Court of Appeal established in the case of Edge v Pensions Ombudsman (1999) that the Pensions Ombudsman cannot make a direction that would adversely affect a person who is not a party to the complaint.
  - This means that the Pensions Ombudsman cannot, in any event, make a direction in accordance with the second part of Mrs Y's complaint, namely that the dependant's pension should be taken away from Miss X. Furthermore, Mr Y's estate is not eligible under the rules of the Scheme to receive a dependant's pension, so it has no legal interest in that benefit.
  - That leaves the first part of Mrs Y's complaint, namely that the lump sum death benefit arising under the Scheme (or more accurately, a lump sum equal to the lump sum that has already been paid to Miss X) should be paid to Mr Y's estate.
  - As set out in the Appendix to this determination, Rule E.15 of the Scheme sets out an order of priorities for determining who should receive payment of the lump sum death benefit.
  - The first priority is payment to any person or persons who were nominated by the member in accordance with Rule E.21. Mr Y did not make a valid nomination for this purpose.

- Mr Y did make a will, but that relates only to the distribution of his freely disposable estate, and does not count as a nomination for Scheme benefits, which do not form part of his freely disposable estate.
  - Scheme booklet MMP/124 “Your Pension Scheme Explained and other Benefits on your Discharge from the Armed Forces” makes clear that a nomination of Scheme death benefits requires the completion of form AFPS Form 2, available online, at any unit administration office and as appended to the booklet. Mr Y did not complete that form. Mrs Y thought that Mr Y had not been informed that he would need to complete a separate nomination form, but that requirement is made clear in the explanatory literature that was made available to Mr Y in various formats.
  - In the absence of a valid nomination, the second priority is payment to any person entitled to a pension under Rule E.1 (surviving spouse or civil partner) or to whom a pension may be awarded under Rule E.2 (adult dependant). Veterans UK found, on the evidence supplied, that Miss X was an adult dependant of Mr Y and paid her an adult dependent pension, so paid the lump sum to her.
  - The third and final priority – payment to the member’s legal personal representatives – is only relevant if there is no one within the first or second priorities. Therefore, having established in this case that Miss X was within the second priority, Veterans UK had no power under the rules of the Scheme to pay the lump sum death benefit to Mr Y’s estate.
18. Mrs Y did not accept the Adjudicator’s Opinion, and the complaint was passed to me to consider. Mrs Y provided her further comments which do not change the outcome. I agree with the Adjudicator’s Opinion, summarised above, and I will therefore only respond to the key points made by Mrs Y for completeness.

### **Ombudsman’s decision**

19. This is a most unfortunate case, and Mrs Y and her family have my sympathies. Mrs Y has asked for an oral hearing, but I do not consider that is necessary as this case turns on the wording of the Scheme Rules.
20. In Mrs Y’s view, Veterans UK’s decision that Miss X was an adult dependant of Mr Y and qualified for an dependant’s pension was flawed, and that meant that not only the dependant’s pension but also the lump sum death benefit should not have been paid to Miss X. Mrs Y considered that Veterans UK had placed too much weight on the evidence of dependency supplied by Miss X, and had not paid enough attention to evidence from Mr Y’s family and friends.

21. However, Mrs Y said she accepted the view expressed in the Opinion that Mr Y's estate has no legal interest in the dependant's pension (because a pension cannot be paid to the estate). Mrs Y has also accepted that, in line with the Court of Appeal decision in Edge v Pensions Ombudsman, I cannot make any determination that would prejudice Miss X, because she is not a party to the complaint.
22. Therefore I cannot make any order in respect of the part of Mrs Y's complaint that relates to the payment of the adult dependant's pension.
23. Rule E.15 of the Scheme contains a strict hierarchy (a), (b), (c) and (d) for identifying the appropriate payee of this benefit. Under many pension scheme arrangements there is a discretion to be exercised as to who should receive payment of a lump sum death benefit, and the payee can include the personal representatives among others also to be considered. However, under Rule E.15 the payment will be made to the deceased member's personal representatives only if (a) there is no nominated person and (b) there is no person who may be awarded a surviving spouse, civil partner or adult dependant's pension.
24. There was no nominated person, as no nomination form (AFPS Form 2) was completed by Mr Y. Mrs Y suggested that omission arose because the RAF or the Army should have informed Mr Y before his deployment that a valid nomination would need to be made in a prescribed form, but failed to do that. However, the RAF and the Army are not parties to Mrs Y's complaint, so I do not need to form a view on whether their information procedures were inadequate.
25. As there was no nomination under item (a), once Veterans UK had concluded that Miss X satisfied the requirements for an adult dependant's pension under item (b), there was no scope for them to pay the lump sum death benefit to Mr Y's personal representatives under item (c). Indeed, Veterans UK would have been in breach of the rules of the Scheme if they had then paid the lump sum to Mr Y's personal representatives. If I were to make any direction for reconsideration of the decision making process, it would necessarily reopen the question of whether Miss X satisfied the criteria under (b). As explained above, I cannot do that.
26. Mrs Y has asked for clarification of what jurisdiction remains in those circumstances. I have jurisdiction to award damages for any non-financial injustice caused by pure maladministration. I have considered the process by which Veterans UK reached their decision, including the consideration given to the evidence produced by Mrs Y during the IDR process, because I have not ruled out the possibility that I could exercise that jurisdiction without affecting the rights of unrepresented parties. In doing this, my role has been to consider whether the correct legal test has been applied by the decision maker and whether there was evidence on which it was reasonable to conclude that the test was satisfied, not whether I would have made the same decision. I cannot substitute my own decision in that sense.

27. The appropriate test in sub-Rule E.2(3) is whether Miss X “satisfies the Secretary of State” that at the time of Mr Y’s death the conditions in paragraphs (a), (b) and (c) of that sub-Rule, relating to their cohabitation, eligibility and financial dependence or interdependence, were met.
28. With regard to item (a) – cohabitation - Mrs Y has said that there had to be a “substantial, exclusive and committed relationship”. Although there has been argument about commitment and these points appear to have been considered by Veterans UK, Rule E.2(3)(a) does not contain the word “committed.” To satisfy limb (a) of the sub-Rule Veterans UK needed to find that there was cohabitation as ‘partners’ and that the relationship was exclusive and substantial. The IDRP2 decision maker addressed Mrs Y’s points about lack of permanence in the living arrangements and concluded that it did not disprove cohabitation. He relied upon an internal record of declared address which has not been proved to be incorrect. I accept that Mr Y spent some of his time with his parents, and used their address for many of his records, but I do not consider that this evidence proves that there was not also cohabitation as a partner with Miss X. The test of exclusivity applies to the relationship rather than the cohabitation.
29. It is clear from the correspondence between Mr Y and Miss X in 2012 that they had an intense relationship which was under a lot of strain. Whether the relationship would have ended or continued after Mr Y ended his tour of duty and returned to home soil must remain, sadly, a matter of conjecture. However, there was in my view evidence from which it was proper for Veterans UK to conclude that at the time of Mr Y’s death the relationship was substantial and exclusive.
30. There is no dispute that item (b) – eligibility – was satisfied as Mr Y and Miss X were both single and of full age.
31. With regard to item (c) - financial dependence/interdependence - I note that Mrs Y has said on several occasions that the Rules refer to eleven specific factors that normally are required to be satisfied, and that Miss X had not met these. However, Rule E.2 does not contain those eleven factors. They are listed in Joint Service Publication 764 AFPS, which says that Veterans UK would expect to see some of them as evidence, and that the list is not exhaustive. As these factors are not actually set out in Rule E.2 they do not have the force of law. I am satisfied that Veterans UK considered whether there was evidence of financial interdependency and was entitled to find that there was. It is not disputed that Mr Y made a contribution to Miss X’s household expenses.
32. Veterans UK have pointed out that even if they had received some of Mrs Y’s evidence sooner, they would have come to the same decision that Miss X qualified for the dependant’s pension. I conclude that they were entitled to reach that conclusion.

33. I therefore find no basis to say that Veteran's UK made their decisions in a way which was wrong in law, that the findings were perverse or that there was maladministration in the way that the decision was reached. I appreciate that this decision will be extremely disappointing and would like to extend my sympathy to Mr Y's family. For the reasons set out above, I do not uphold Mrs Y's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
19 January 2017

## Appendix

1. Rule E.1(1) of the Scheme (Surviving spouses' and civil partners' pensions) provides that:

"If an active member, a deferred member or a pensioner member dies leaving a surviving spouse or civil partner, the surviving spouse or civil partner is entitled to a pension for life."

2. Rule E.2 of the Scheme (Other adult dependants' pensions) provides that:

"(1) If an active member, a deferred member or a pensioner member dies leaving a surviving adult dependant and no surviving spouse or civil partner, the Secretary of State may award the surviving adult dependant a pension for life.

...

(3) A person is a surviving adult dependant in relation to a member for the purposes of this rule if the person satisfies the Secretary of State that at the time of the member's death –

(a) the person and the member were cohabiting as partners in an exclusive and substantial relationship,

(b) the person and the member were not prevented from marrying (or would not have been so prevented apart from both being of the same sex), and

(c) either the person was financially dependent on the member or the person and the member were financially interdependent."

3. Rule E.15 of the Scheme (death of a member: lump sum death benefit) (as amended by statutory regulations before Mr Y died) provides that:

"(1) If a member dies before reaching the age of 75, the Secretary of State may pay a lump sum to any of the following –

(a) the person or persons nominated by the member in accordance with rule E.21;

(b) if there is no person within sub-paragraph (a), to any person who is entitled to a pension under rule E.1 in respect of the member, or to whom a pension may be awarded under rule E.2 in respect of the member;

(c) if there is no person within sub-paragraph (a) or (b), to any person who, but for the application of rule E.1(2) or rule E.2(2), would be so entitled or to whom a pension may be awarded; or



(d) if there is no person within sub-paragraphs (a), (b) or (c), to the member's personal representatives."

4 Rule E.21 of the Scheme provides that:

(1) For the purposes of rule E.15 (death of a member: lump sum benefits)-

...(a) a member may nominate one or more persons, and

(2) The member must make his nomination by notice in writing to the Scheme administrator in such form as the Secretary of State may require or is willing to accept.