

Ombudsman's Determination

Applicant	Mrs S
Scheme	Canon (UK) Ltd Pension Scheme (the Scheme)
Respondent	Trustees of the Canon (UK) Retirement Benefit Scheme (the Trustees)

Complaint Summary

1. Mrs S' complaint is about the Trustees' decision not to pay her a benefit from the Scheme following the death of her husband. The Trustees' decision is to pay the death in service lump sum to her children, along with the dependent's pension. While Mrs S does not dispute the decision to pay the benefits to her children, she is claiming that she should have received part of the death benefit to assist her in paying off Mr S' debts and his share of their joint mortgage.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against the Trustees and remitted back to them to reconsider. This is because they cannot demonstrate that they gave proper consideration to all of the matters which were relevant before deciding how to distribute the death benefits due under the Scheme Rules.

Detailed Determination

Material facts

3. The relevant Scheme Rules in relation to the payment of death in service benefits following the death of an active member can be found in Appendix I.
4. Mr S was an active member of the Scheme at the time of his death on 2 May 2016. Prior to his death, he had completed a death benefit nomination form nominating Mrs S as the sole beneficiary. This form was completed in 2004. At the time of his death, Mr S had accrued pension benefits in both the final salary and CARE sections of the Scheme, and the lump sum death benefit was £229,793.44.
5. Following Mr S' death, the Trustees were in contact with Mrs S. On 15 May 2016 Mrs S completed a CBD1 information gathering form which stated that she was living separately from her late husband. She also provided a statement in support. This went into detail about her children's special needs and the arrangements that she and her late husband had made for their care, namely that she lived in rented accommodation and her late husband had remained in the family home in order to provide stability for the children, but that they had shared care. Mr S had made no will, and after a conversation which she had recently had with him, she believed that he had cancelled his life insurance in anticipation that the scheme death benefit would pay off the outstanding mortgage in the event of his death. Mrs S told the Trustees "if you make a decision that I should not be the beneficiary of the pension death in service payment then maintaining the family home will be financially unviable for me (and go against the very essence of Mr S' wishes to support his children in the event of his death)".
6. By letter dated 27 June 2016, Mrs S provided copies of her bank statements showing transfers to her late husband's account which were towards any family or household expenses. She reiterated that she had moved out of the family home in 2011. She had rented a property so that she and Mr S could retain the family home as neither of them could afford to buy one another out of the mortgage and that this arrangement was in order to keep the children in their routine. She also enclosed a further copy of the mortgage account and a recent utility bill. She said she was unable to obtain Mr S' bank statements as the account was closed and ended the letter "Please can you advise me of anything else you would need if anything. I will await your response."
7. On 14 July 2016, the Trustees requested that she provide additional information: (i) a copy of Mr S' bank statements for the last 12 months (and agreed to pay any bank charges); (ii) details of any immediate hardship costs she would incur supporting her children in order that they could consider interim payments; and (iii) a copy of the cancellation documents of Mr S' life insurance policies.

8. On 18 July 2016, Mrs S replied enclosing confirmation that the life insurance policy had been cancelled in May 2014, some further bank statements showing her recent expenditure, a list of direct debits from Mr S' bank account and one from her own. She said she could not provide Mr S's bank statements as requested because the account was closed. The letter also explained that child X was mainly staying with his grandparents as an 'interim measure' and she had taken a two month unpaid career break over the summer holidays so that she could concentrate on re-establishing a stable family relationship.
9. On 27 July 2016, the Trustees wrote acknowledging receipt of this further information and told her they had decided to pay Mrs S £5,000 towards funeral costs and £1,000 for the benefit of one of her children by way of interim payment.
10. These amounts were deducted from the overall lump sum death benefit payment.
11. On 17 August 2016, an email was sent between the Trustees in relation to the payment of the lump sum death benefit. Along with the lump sum amount, it confirmed an annual dependent's pension of £10,606.80 was payable under the CARE arrangement, and a further annual dependent's pension of £6,761.64 was payable under the Final Salary section of the Scheme. The email set out what specific areas the Trustees should consider, enclosed the relevant rules, and said "...we think we should document any decisions to make with direct reference to our authority to make such decisions".
12. The same day the Trustees met via a telephone conference call. However, there are no notes or minutes of this discussion.
13. On 23 August 2016, the Trustees wrote to inform Mrs S that they were working through the case and would write again no later than 30 September 2016.
14. On 26 August 2016, the Trustees received legal advice. This advice agreed that Mrs S and her children both qualified as dependents under the rules of the Scheme. It acknowledged that the Trustees have absolute discretion under the rules as to whom and in what proportion the lump sum death benefit can be paid, confirming that as between Spouses and other Dependents the rules provided for no hierarchy. The advice went on to say that the Trustees should check:
 - the Scheme Rules;
 - locate the expression of wish form and whether the member's circumstances had changed;
 - investigate the family circumstances;
 - identify potential beneficiaries;

- establish who was dependent/interdependent on Mr S;
 - collect relevant evidence; and
 - document the reasons for the decision and the steps taken to make that decision.
15. On 7 September 2016, the Trustees held a conference call to discuss the case and met for a full board meeting the next day. There are no notes of the telephone discussion and the minutes of the meeting on 8 September 2016 make no reference to any decision in relation to the lump sum death benefit payment or the dependent's pension.
16. On 14 September 2016, the Trustees wrote to Mrs S and Mr S' parents (with whom one of the children was then residing) and explained that, following legal advice, it was the Trustees' decision to divide the lump sum death benefit equally between the two children. It set out its reasoning as follows:
- The Trustees have confirmed that a death in service benefit is payable and also a dependent's pension to beneficiaries as decided by the Trustees. The beneficiaries are people legally dependent on the member.
 - Mr S left a beneficiary nomination form dated 2004 in favour of his wife, Mrs S. Since completing the beneficiary nomination form Mr S' circumstances had changed. He had separated from Mrs S and was living separately from her with their children.
 - The Trustees have taken time to investigate the financial and practical circumstances of Mr S prior to his death. Discussions have taken place with his widow and his parents, along with internal enquiries.
 - The Trustees identified potential beneficiaries as Mrs S, the children and Mr S' parents.
 - The Trustees are satisfied that the children were dependent on their father. No dependency or interdependency in respect of the other potential beneficiaries has been demonstrated, and in any event would not be deemed, in the view of the Trustees, to override the dependency of Mr S' children.
 - The Trustees have made a decision based on the circumstances at the time of Mr S' death and the domestic arrangement made several years prior.
 - There had been a separation in place for approximately six years and Mr and Mrs S were living independently. Mrs S was not financially dependent on Mr S. Children X and Y had been living with and were financially dependent on Mr S.
 - The circumstances had changed since Mr S completed the statement of wish in 2004 and they believed his wishes had changed considerably over that time

frame. They were only obliged to use the document as a guide and the final decision was at the Trustee discretion.

- Finally, the Trustees said that a dependent's pension would be paid equally to children X and Y until age 18 (or 23 if the children remain in higher education) and the lump sum death benefit would be put into trust on behalf of the children. The next steps would be to identify a suitable Trust Based Scheme that will manage the benefit.

17. On 23 September Mrs S wrote to the Trustees confirming her intent to appeal. She underlined the point that she and Mr S shared full and equal parental responsibility for their children, that she had provided proof of the cancellation of life insurance as requested, and that they had ongoing joint liabilities. In this letter, she also mentions that, following Mr S' death, she had a meeting with Mr S' bank where she was informed that he had accrued personal debts of approximately £16,000, which, as the spouse, she was now legally liable for. Mrs S also explained that arrears of mortgage payments had accrued and she was now liable for those debts too, plus the full outstanding mortgage.
18. On 27 September 2016, Mrs S had solicitors write to the Trustees on her behalf raising doubt about the correctness of the information the Trustees had been given and asking for disclosure of the documentation and relevant information relied upon in order that Mrs S could rebut it. They said that child Y was living with Mrs S. Mrs S had therefore reduced her hours to look after him, as well as reduced her pension contributions, as she could not pay the mortgage. She had also moved back into the family home and had thereby incurred responsibility for mortgage and utility arrears. They added that Mrs S had not informed the Trustees that she and Mr S had agreed to name the other as main beneficiary for life policies and death in service benefits for the sole purpose of clearing the mortgage liability for either of them should one pass away. This is so that either of them would be financially secure. Also, the children already have a savings account of which Mrs S is sole signatory and uses this account to pay for numerous items for the children.
19. On 3 October 2016, the solicitors wrote again pointing out that Mrs S was in receipt of the children's benefits, she paid for everything at school, holiday clubs, school clubs, and after school care and offered to produce evidence in support.
20. On 26 October 2016, the Trustees replied with a decision under the second stage of the Scheme's internal dispute resolution procedure (**IDRP**). They said they had treated Mrs S's appeal this way, rather than send it to Capita for decision under stage one, because she had sent her correspondence to the Trustees and 'in order to expedite a resolution'. The Trustees acknowledged the further correspondence sent and upheld the decision made on 14 September 2016. They explained:

- “The funds will be placed into a Discretionary Trust.. managed by a separate Board of Trustees with experience in dealing with similar cases. The funds will be available from the time they are put in the Trust for the benefit of [children X and Y]..Your client and also potentially [Mr S’ parents] (as we understand that child X is currently residing with them) will therefore be able to access the funds [for the children’s benefit].”
- They did not require any further information from Mrs S. They relied on the CRBS beneficiaries data form and the supplementary information Mrs S had provided when requested.
- They declined to disclose other information they had received before coming to their decision, but confirmed they had held no meeting with third parties.
- They noted that the children were dependent on Mrs S, but their consideration had turned on who was dependent on Mr S. Mrs S had clearly stated that she was not.
- They had considered her as a potential beneficiary because she was a spouse.
- They were aware that Mrs S had joint/shared responsibility for the children.
- They were to have regard to statements of wishes but were not bound by them.

21. The letter of 14 September 2016 set out the steps they had taken to reach the decision clearly. On 3 November 2016, Mrs S’ solicitors wrote again to the Trustees to argue that it had ignored her as the legal spouse; “You have ignored the fact that our client is the widow, that she is now left with servicing a mortgage and a house on a sole income whereas before there was a joint income. It is evident that she is a dependent and with the sole responsibility for the children her ability is bound to limit her future income...[sic]. For the avoidance of doubt our client does not begrudge part of the funds being allocated for the children, however she would have expected for at least Mr S’ have [sic] share in the mortgage to have been paid from the trust.”
22. Mrs S continued with her complaint, which was eventually made to this office. As the two-year deadline for payment of the lump sum death benefit was approaching, the Trustees confirmed that, as custodial issues relating to the children had been clarified, the lump sum would be paid. Rather than paying it into a trust as stated in all previous correspondence, the Trustee split the lump sum in half and paid the guardians of each child. Mrs S received an amount in relation to one child on 4 May 2018.

Summary of Mrs S' position

23. Mrs S' position is that as stated by her solicitors on 3 November 2016. In summary, she feels that she has not been treated equally as Mr S' spouse, or that the Trustees took into account her actual relationship with Mr S at the time of his death.

Summary of the Trustees position

24. There has been various correspondence with the Trustees in relation to the complaint. In its initial response to this office, the Trustees reiterated the IDRP decision that the lump sum death benefit would be paid into a trust for the children, and the guardians could make a request to the trust for any additional housing costs. The Trustees also stated that it had considered the additional information provided, but had decided to uphold the original decision.
25. In later submissions, the Trustees have submitted that it discussed the case in detail and each Trustee's view. The Trustees also state, "Before progressing our discussions to a decision, the Trustees wanted to make sure that we were following all the correct processes, were acting in line with the Scheme Rules and discretionary powers, were not potentially making any errors in our decision making processes and that we had made both suitable enquiries and were only considering relevant information". The Trustees therefore stand by their decision and say that they considered all relevant facts, the correct scheme rules and they did not feel that the residual financial interdependence outweighed the dependency of the children.
26. The Trustees admitted that they failed to minute the decision they made in the Trustees' meeting on 8 September 2016 and have identified this as an area for improvement. However, they felt at the time that the telephone conference call the day before would give them more time to discuss and consider the issue.
27. The Trustees have also emphasised that this particular case has been a very difficult decision for it, but relies on the legal advice and their absolute discretion under the Scheme Rules to pay the benefit in the way that they have.
28. However, it is the Trustees' view that they did consider Mr and Mrs S' interdependency and this can be evidenced in their letter to Mrs S dated 26 October 2016. They say it was made clear to Mrs S that she could use the funds allocated to her sons in any way that she wished, including the payment of debts or mortgage.

Conclusions

29. The Scheme Rules give the Trustees power to decide the shares in which they distribute death benefits as between potential beneficiaries. The Courts have made it clear that in exercising such a power scheme trustees may prefer some beneficiaries

over others, provided that the decision to do so is made properly. The Court of Appeal¹ said:

“The essential requirement is that the trustee address themselves to the question of what is fair and equitable in all the circumstances. The weight to be given to one factor as against another is for them. The duty to act impartially is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power – that he exercises the power for the purpose for which it was given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant. If pension fund trustees do that, they cannot be criticised if they reach a decision which appears to prefer the claims of one interest – whether that of employers, current employees or pensioners – over others. The preference will be the result of a proper exercise of the discretionary power.”

30. The relevant rules the Trustees need to consider in relation to the payment of death in service benefits (under both the 2006 Rules and the subsequent Deeds of Amendment) are Rules 19.1, 19.2, 22.4 and 24. I agree that the Trustees have taken into account the correct Scheme Rules in making their decision. They took legal advice on what was plainly a difficult decision that had to be taken against a backdrop of considerable uncertainty. I am satisfied that they tried to make a proper decision.
31. However, in order to show that they gave proper consideration to all relevant matters and excluded irrelevant ones, the Trustees must be able to demonstrate their reasoning in light of the evidence which was before them. I am satisfied that the Trustees correctly identified Mrs S as a potential beneficiary. They have consistently told her so from the outset and also raised a question with lawyers about how a spouse ranked in the order of distribution under the rules. Plainly they turned their minds properly to her status as potential beneficiary.
32. I agree that the 2004 expression of wish was so old as to require the Trustees to consider any changes in circumstance which had occurred since it was completed. It was very clear from the evidence which they had before them that there had been significant changes of circumstance since 2004. These had fundamentally altered the living and childcare arrangements between Mr and Mrs S.
33. The Trustees recognised the joint responsibility that Mr and Mrs S held for the children, and the clear evidence that both of them wanted to secure their future stability in a secure home. They knew about the parents' joint liability to continue paying a mortgage on the house used to house the children. They also knew that the arrangements for care of their children which Mr and Mrs S had maintained up until the death of Mr S were no longer in place. I am satisfied that they considered these issues. It is evident from the decision letter sent to Mrs S and to Mr S's parents that

¹ Edge v Pensions Ombudsman, Court of Appeal (Civil Division), 29 July 1999

they had considered the interests of the children and the wishes of Mr S to see them looked after.

34. However, it is also clear from the decision letter that when they made their decision about how to distribute the death benefits as between the eligible beneficiaries, the Trustees considered there was no interdependency between Mr and Mrs S. Indeed the independence of Mr and Mrs S's living arrangements appears to have been a significant factor in the Trustees decision making. I consider that the conclusion that there was no interdependency was one which no reasonable decision maker could arrive at faced with evidence of an undissolved marriage, shared mortgage liability and joint responsibility for minor children. Albeit there may have been no evidence that one marriage partner was dependent on the other, there was clear evidence of interdependency and I make a finding of fact to that effect.
35. I consider that the Trustees were under an obligation to acknowledge the interdependency of Mrs S, as surviving Spouse, with equity in the former family home but also responsibility for joint and any inherited debts, and responsibility to maintain the children (whether or not they lived with her) before going on to decide what weight to give to her interdependency with the deceased. I therefore remit the death benefits distribution decision to the Trustee for reconsideration with the intention that they take the fact of Mr and Mrs S' continued interdependency into account. By doing so I do not intend to bind the Trustees future decision. It may be that having given due consideration to the interdependency of Mr and Mrs S, in the context of the other evidence, the Trustees could reasonably reach the decision that they did. I express no view on that point. Mrs S is however entitled to understand how her interdependency has been considered and to be told why the Trustees reach any decision which they do.
36. I have considered the submission that the Trustees' position on interdependency was clarified at IDRPs, but do not consider that it should change the outcome of the determination. I consider that the initial reasoning was too plain to require or be open to clarification. Moreover allowing Mrs S to make an application to a Trust established for the benefit of someone else is not the same thing as considering her as a potential beneficiary in her own right.
37. Lastly, I turn to distress and inconvenience. There is no doubt that the failure to recognise the interdependency of Mr and Mrs S has caused Mrs S significant distress and inconvenience. This was on, any view, a fraught situation for everyone concerned.
38. I understand that while the case has been the subject of complaint, the Trustee has in fact revisited and revised the decision which was originally communicated to Mrs S. My direction below reflects the outcome of the complaint as it was originally presented and does not reflect on any decision which has subsequently been made

and communicated to Mrs S. To the extent that the Trustee has already complied with the direction to reconsider the exercise of discretion it is not required to do so again. I express no view on any such redecision.

Directions

39. Within 28 days of the date of this decision, the Trustees should:

- reconsider its decision to distribute death benefits due under the Rules. In communicating its decision to the beneficiaries, it must state the reasons for the decision, the Scheme Rules that were used in making the decision, and what information was taken into account to reach it; and
- pay Mrs S £500 to recognise the distress and inconvenience caused.

Karen Johnston

Deputy Pensions Ombudsman
31 July 2018