



Independent Trustees



Briefing note – May 2012

### Getting it right and making appropriate decisions

Reaching an appropriate decision when exercising a trustee discretion can be fraught with pitfalls. At least, that's how it seems when you take a look at rulings from the Pensions Ombudsman, who gets involved when complaints are escalated outside of a scheme.

## Trustee discretions – payment of death benefits

### **Mrs S Earle v Michelin Pension**

A recent case arising from the death of Mr Earle, an active member of the Michelin Pension and Life Assurance Plan, is a clear example of where things can go wrong if the correct procedure is not followed and trustees rely solely on the wishes expressed in a member's expression of wish form. In this case, the Pensions Ombudsman ruled that the trustees twice made improper decisions regarding who should receive the member's death benefit lump sum.

The case centred on Mr Earle's expression of wish form, which had been made some time before his death and before his personal circumstances had changed. The trustees decided to pay Mr Earle's lump sum death benefit to his daughters from a previous marriage in accordance with his expression of wish form. However, Mr Earle had met and married his current wife since completing this form.

Mrs Earle was concerned that, as she had not been listed on the expression of wish form, the trustees had not considered her as a possible dependant. She complained to the Pensions Ombudsman who upheld the complaint, determined that there had been maladministration and referred the matter back to the trustees.

The trustees duly went away to seek additional information and eventually concluded that their original decision was correct. They felt that, as Mrs Earle was receiving a spouse's pension and Mr Earle's estate would be passed to her, Mr Earle might have wanted the lump sum to be paid to his daughters. Believing it would be an invasion of personal privacy, the trustees did not actually investigate the financial situation and the extent of the dependency of any of Mr Earle's potential beneficiaries.

### **Mrs Earle again took her case to the Ombudsman who, in his second ruling, stated:**

"In reaching their decision, the Trustee Board needed to ask the right questions, construe the rules correctly and take into account all relevant matters but no irrelevant matters. They were required not to come to a perverse decision, i.e. a decision which no other reasonable decision maker faced with the same evidence would come to."

The Ombudsman felt it was wrong for the trustees to try and guess what Mr Earle's wishes would have been and did not agree that investigating the financial circumstances of potential beneficiaries would have been an invasion of privacy.

## Discretions in practice

Our years of practical experience as scheme secretary and trustee have shown us that an effective trustee discretion process must:

- be proportionate;
- effectively gather all relevant information;
- give proper regard to the scheme rules; and
- enable the trustees to make a well thought-out decision in light of all relevant circumstances.

Your scheme rules will define what benefits are payable on the death of a member and set out who the potential beneficiaries can be. This might be a spouse or civil partner; however, there is often discretion vested in the trustees to treat other partners in a similar way or consider another dependant, financial or otherwise.

**The devil is in the detail and no rules are precisely the same so it is important you check and understand yours.**

The expression of wish form is a primary document to review but, as the Michelin case highlights, you need to consider how long ago it was completed and whether the member's circumstances could have changed? **Do not consider an expression of wish form in isolation.**

Clearly, the period following the death of a member is a sensitive time for the deceased's family. However, the trustees need to make full enquiries to **gather supplementary information about all relevant circumstances and all potential beneficiaries.** Focus on the relevant issues in view of your precise scheme rules. If financial dependency is a test, proof of this will be required.

Whether it is a trustee, administrator or scheme secretary making the enquiries, they should try to do so in one go rather than having to keep going back to family members. Do not accept one potential beneficiary's word – keep collecting evidence. Although using a checklist is helpful, it won't cover all eventualities and they will need to **be prepared to ask some difficult questions.** The most important thing to do is to **remember to consider the individual's circumstances.**

Having collected all the information, the facts may appear fairly straightforward and, in these cases, it is typical for the trustee board to delegate the decision making process to a smaller committee. This can speed things up, but the process for delegating the decision and the circumstances under which it is appropriate to do so should be properly documented. More complex cases will usually be considered by the full trustee board.

**Always document the reason for a decision and the steps taken to make it** – you will need this if you are required to respond to a challenge.

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This briefing note is provided for general information only and should not be relied upon as advice on your specific circumstances.

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### Find out more

If you have any questions about the practical implications of the Mrs S Earle v Michelin Pension case, or would like an independent review of your scheme's trustee discretion process, please contact Mark Homer or Tina James.



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