

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

Applicant	Mr and Mrs A S McNee
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	The Royal Borough of Kensington and Chelsea (RBKC), Capita

Subject

Mr and Mrs McNee have complained that RBKC and Capita failed to pay the lump sum death benefit payable on the death of their daughter to them, contrary to her expression of wish.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld against RBKC because they failed to give proper consideration to Mr and Mrs McNee as potential eligible recipients of the death grant.

DETAILED DETERMINATION

Material Facts

1. Ms McNee was employed by RBKC until November 2010. She was a member of the LGPS and was awarded deferred benefits on leaving. In March 2005, she had signed a 'Death Grant Nomination Form' stating that, in the event of her death, she wished RBKC to pay the death grant to her parents (50% each) and giving their address. Ms McNee died on 4 September 2011.
2. Capita (who administer the LGPS on behalf of RBKC) were informed of Ms McNee's death by Mr W. They sent him some forms to complete and asked for copies of the death certificate and any relevant birth and marriage certificates. Mr W responded, on 9 November 2011, enclosing (amongst other things) a copy of Ms McNee's son's birth certificate and a will. Ms McNee's son had been born in 2009. The will was dated 8 April 2010 and provided for her residuary estate to be held on trust for her son until his 30th birthday. Ms McNee had appointed Mr W and another as her trustees and her son's father and another as testamentary guardians for her son. On the form, Mr W gave details of Ms McNee's son and stated that the son was resident with his father, whom he named as Mr R. He did not give any details relating to Ms McNee's parents. Mr W indicated on the form that he was Ms McNee's uncle and executor.
3. Capita sent a copy of the will to RBKC and asked if this was adequate for determining who should receive the death grant. RBKC asked Capita to find out if Ms McNee's parents were still alive. Capita wrote to Mr R saying that there was a death grant payable and that Ms McNee had completed a nomination form in favour of her parents. They asked Mr R to confirm if Ms McNee's parents were still alive and, if so, to provide their contact details. Capita went on to explain that the death grant was not payable to the estate and that RBKC had discretion as to whom it was payable. They asked Mr R to provide a copy of a will or grant of probate to assist RBKC in making a decision. Capita also explained that Ms McNee's son would be entitled to a child's pension and asked Mr R to complete a bank mandate form.
4. On 12 December 2011, Capita notified RBKC that they had been informed that Ms McNee's parents were still alive and that they were waiting for contact details. They also said that Mr R wished to appeal the decision to pay the death

grant to Ms McNee's parents on the grounds that she had completed the nomination form in 2007 (*sic*) and had had a son since. Capita said that Ms McNee's will had been revised since the nomination form and implied that everything should go to her son. They asked if RBKC wished to reconsider the decision or should they continue to seek contact details for Ms McNee's parents.

5. On 15 December 2011, RBKC's then Director of Human Resources and General Services decided that the death grant should be paid to Ms McNee's estate on the basis that the nomination form was advisory only. He went on to say that the executors could then obtain probate and pay the grant to her son. Capita were informed of this decision.
6. On 9 August 2012, Capita wrote to Mr W saying that they had been informed by RBKC that, as the nomination form was advisory only, it had been agreed to pay the death grant to Ms McNee's estate. They asked for sight of the grant of probate to enable them to make payment.
7. On 11 October 2012, Capita received a letter from a firm of solicitors, Parry Law, who said that they were acting for Mr R in connection with Ms McNee's estate. They said they had applied for grant of letters of administration on the basis of an intestate estate and asked to be sent any forms which needed to be signed. Capita responded by sending them a bank mandate form. Parry Law sent Capita a copy of a grant of representation issued by the Court, on 31 January 2013, granting administration of Ms McNee's estate to Mr R and another for the use and benefit of her son. Parry Law asked that they be sent a cheque made payable to them in respect of any monies due to the estate. They enclosed a letter of authorisation signed by Mr R and another. Capita forwarded these to RBKC.
8. The case was referred to the Bi-borough Director of Human Resources. She was provided with a memo which said,

"... There is a death grant payable of ... The expression of wish form that was completed in 2007 (*sic*) named her parents who are still alive. The member had a child ... on ... 2009 and a pension is being paid to him. The father of the baby appealed against the DG being paid to the parents as he said Miss McNee's circumstances had changed since she completed the form and that her wishes made in her will should be taken into account. Miss McNee named ... as her trustees giving them the power to use the money for her son. The director at the time agreed and

advised the DG should be paid to the estate and the trustees could apply for probate. I am not sure why a payment wasn't raised at that time. Probate is now attached naming the trustees. The trustees have requested the DG is paid to the solicitors ..."

9. On 19 February 2013, the Bi-borough Director of Human Resources decided that the death grant was to be paid to Mr R and the other trustee "for the use and benefit of" Ms McNee's son.
10. On 21 February 2013, Capita wrote to Mr R informing him that RBKC had decided that the death grant should be paid (in equal shares) to him and the other trustee for the use and benefit of Ms McNee's son. They said that they would pay the amount into his bank account and that they had asked the other trustee for bank details. Parry Law wrote to Capita asking that the monies be paid into their client account and enclosing authority from Mr R and the other trustee for this to happen. Capita wrote to Parry Law, on 12 April 2013, saying that the death grant would be paid into their account within 10-15 working days, which it subsequently was.
11. On 10 April 2013, Mrs McNee had written to Capita enclosing a copy of the death grant nomination form. Capita received this on 12 April 2013. Mrs McNee said that the form clearly stated that her daughter wanted any monies to be paid to her parents. She explained that the form had only just come to light when her husband had cleared out a bundle of old correspondence. She said that she had telephoned "Mowden Hall" (one of Capita's offices) and spoken to a member of staff who had advised her to send in a copy of the form.
12. Capita responded, on 18 April 2013, saying that RBKC had decided that the death grant should be paid to the executors named in Ms McNee's will and that the decision was at the borough's discretion.
13. Mr and Mrs McNee have appealed unsuccessfully against this decision under the Scheme's internal dispute resolution procedure.
14. RBKC have provided a copy of their 'Statement of Local Employer Pension Policy' dated February 2012. This provides for decisions about the payment of death grants under Regulation 23 (active members) to be made by the Chief Human Resources Officer. RBKC have confirmed that they do not have a policy or procedure in place to write to the last known address given on a nomination form.

Summary of Mr and Mrs McNee's Position

15. Mr and Mrs McNee have made detailed submissions. The key points are summarised below:

- Their daughter's wish was that the death grant be paid to them in equal shares.
- In their eyes, this "small bequest" belongs to them as Ms McNee's parents and next of kin.
- The decision making process has been unclear and lacking in visibility and accountability.
- The first major error occurred when RBKC's then Director of Human Resources asked Capita to contact the 'next of kin' so that the death grant could be paid to them. This was not done.
- They were not contacted or given an opportunity to state their case or appeal the decision.
- The Head of HR at RBKC forced through the view that the death grant formed part of their daughter's estate, which was incorrect.
- The death grant was paid into the probate fund in "almost total secrecy" and they have heard nothing further of it since.
- As a consequence of the way in which matters have been handled, they are both now suffering stress-related problems.

Summary of RBKC's Position

16. RBKC say:

- They believe that the decision to pay the death grant, through Parry Law, to the individuals named in the grant of probate, dated 31 January 2013, was correct.
- The decision was based upon the fact that there had been a significant change in Ms McNee's circumstances since she completed the nomination form in favour of her parents. In particular, these were the birth of her son and her expression of wish in her will.

- The Pension Fund Administrator has absolute discretion over who receives any lump sum death grant and Ms McNee's wishes were considered.
- They acknowledge that there were inconsistencies in the way the case was handled. However, Ms McNee's son was an interested party whose interests were being represented by his father, Mr R.
- It is possible that Ms McNee had forgotten that she had completed the nomination form and had not taken steps to update it following the birth of her son.

17. Capita have said that they do not wish to make a separate submission.

The Local Government Pension Scheme Regulations

18. As at the date of Ms McNee's death, the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended), provided,

“32.(1) If -

(a) a deferred member, or

(b) a pensioner member with deferred benefits under regulation 20(9)

dies, a death grant is payable.

(2) The administering authority at their absolute discretion may make payments in respect of the death grant to or for the benefit of the member's nominee or personal representatives, or any person appearing to the authority to have been his relative or dependant at any time.”

Conclusions

19. Under Regulation 32 of the LGPS Regulations, payment of the death grant is at the absolute discretion of RBKC as the relevant administering authority. They may pay the death grant to the member's nominee or personal representatives, or any person appearing to them to have been his/her relative or dependant at any time. Payment of the death grant is, therefore, an exercise of discretion on the part of RBKC.

20. There are well-established principles which RBKC should have followed in exercising their discretion. Briefly, they should:
- have taken into account all relevant matters and no irrelevant ones;
 - have asked themselves the correct questions;
 - have directed themselves correctly in law (in particular, they must adopt a correct construction of the Regulations;
 - not have arrived at a perverse decision.
21. A perverse decision is taken to mean a decision which no reasonable decision maker, properly directing itself, could arrive at in the circumstances. If the above principles have not been properly followed, I can ask RBKC to look at the matter again. However, I cannot replace RBKC's decision with a decision of my own nor can I tell them what their subsequent decision should be. The discretion remains for RBKC to exercise.
22. The first question for RBKC was who, on a proper construction of the LGPS Regulations, might be eligible to receive all or part of the death grant. They were aware that Ms McNee had completed a nomination form in favour of her parents. Mr and Mrs McNee would be eligible to receive all or part of the death grant as Ms McNee's nominees or as her relatives. However, the nomination form, itself, was not binding on RBKC. They had a responsibility to consider whether there were any other parties to whom all or part of the death grant could be paid. In Ms McNee's case, they had been informed that there was a will and Mr W was an executor. They had also been informed that Ms McNee had had a son. All or part of the death grant could have been paid to Mr W, as the personal representative, or to (or more probably for the benefit of) Ms McNee's son, as either her relative or a dependant.
23. Between notification of Ms McNee's death and payment of the death grant, the will was superseded by a grant of representation issued by the Court on 31 January 2013 granting administration of Ms McNee's estate to Mr R and another for the use and benefit of her son. RBKC could, therefore, consider paying the death grant to Mr R and the other trustee, as Ms McNee's personal representatives.

24. The decision to pay the death grant to Mr R and the other trustee – whether as a payment to the estate or outside the estate to hold the money on trust for the son – was within the range of decisions which a reasonable decision-maker could have reached; notwithstanding the nomination form. However, before reaching such a decision, RBKC had to take into account all relevant matters and one of those relevant matters was the position of Ms McNee’s parents.
25. Whilst RBKC were not bound in any way to pay the death grant to Mr and Mrs McNee, they should have taken appropriate steps to consider them as potential recipients. They should have contacted Mr and Mrs McNee and given them the opportunity to provide details of their position. I note that RBKC asked Capita to find out if Ms McNee’s parents were still alive and they were informed that Capita were waiting for contact details. No further steps appear to have been taken to make contact despite the fact that RBKC already had Mr and Mrs McNee’s address. They started to do things properly, but did not follow it through.
26. It may well be that, upon proper consideration of the competing interests, RBKC find that Ms McNee’s son is the preferred recipient, but they were not in a position to make that decision when they decided payment should be made. For example, they say that they considered that Ms McNee might have forgotten to update the nomination on the birth of her son. That may be right – but they might have established that her parents’ financial position or some other consideration unknown to them indicated that she had deliberately left the nomination unchanged.
27. So Mr and Mrs McNee’s complaints can be upheld against RBKC. Since the decision was not Capita’s responsibility, I am not upholding the complaint against them.
28. As I have said, it is not for me to make the decision as to whether Mr and Mrs McNee should receive any payment. The decision remains with RBKC and the proper course of action is for the decision to be remitted for reconsideration.
29. If RBKC find, having given due consideration to Mr and Mrs McNee’s claim, that they should be paid all or part of the death grant, payment should be made immediately, together with simple interest at the rates quoted for the time being by the reference banks. There is the added complication that a payment had

already been made. However, the decision as to whether any potential overpayment would have to be recovered is a separate matter and should not be taken into account in determining whether any payment is made to Mr and Mrs McNee.

30. Any payments made to Mr and Mrs McNee would now fall outside the two-year window for payment of lump sum death benefits and may be classed as unauthorised payments if made from the pension scheme. Should a tax charge arise, it would not be appropriate for this to be borne by Mr and Mrs McNee and I have made directions accordingly.
31. In the circumstances, I also find that it is appropriate for Mr and Mrs McNee to receive some modest compensation for the distress and inconvenience they have suffered in having to pursue their claim in this manner at a difficult time.

Directions

32. Within 21 days of the date of my final determination, RBKC will contact Mr and Mrs McNee to obtain the necessary details for them to consider their claim to the death grant. Upon receipt of these details, RBKC will review their decision and write to Mr and Mrs McNee with the outcome of this review, setting out reasons for their decision.
33. Should that decision be that Mr and Mrs McNee should receive some or all of the death grant, RBKC shall settle any tax charge arising out of the late payment on their behalf.
34. Within the same 21 days, RBKC will also pay Mr and Mrs McNee £250 each for the distress and inconvenience they have suffered as a result of the failure to consider them as potential beneficiaries in a proper manner.

Tony King
Pensions Ombudsman

5 September 2014