

Ombudsman's Determination

Applicant	Mrs Y
Scheme	Merchant Navy Officers Pension Fund (MNOPF)
Respondent	MNOPF Trustees Limited (the Trustee)

Outcome

1. The complaint should not be upheld because Mrs Y did not fulfil the scheme criteria for payment of a spouse's pension and the Trustee's decision making process regarding Mrs Y's request for payment of a discretionary benefit was reasonable.

Complaint Summary

2. Mrs Y's complaint concerns the Trustee's decision not to award her a spouse's pension, even though her late husband, Mr Y nominated her in an Expression of Wish Form (**the Form**).

Background information, including submissions from the Parties

3. Mr Y was a member of the MNOPF's "Old Section" from 1974 to 1978. From 1978, he became a member of the "New Section" until he retired in January 2012. Mr Y's pension comprised benefits accrued under both the "Old Section" and the "New Section".
4. Mrs Y's complaint relates to the benefits accrued since 6 April 1978 in the "New Section" of the MNOPF. Under Rule 8.1 of the Rules dated 25 June 1999 (**the Rules**), which govern the MNOPF, on the death of a pensioner any surviving spouse is entitled to a pension of one half of the pension that had been payable to the pensioner prior to his or her death. (Rule 8.1 is set out in Appendix 1).
5. Mr and Mrs Y had lived together as husband and wife since 1979 but were not legally married. On 13 November 2013, Mr Y completed the Form, nominating Mrs Y as sole beneficiary of any discretionary death benefit awarded under Rule 35 in respect of his service under the Old Section. The Form said:

“This Section should be completed only if: (a) you are a Member of the Old Section of the MNOPF; and (b) you do not have a legal spouse. In the event of my death, I wish to nominate the person named below to be my nominated partner for the purpose of Rule 35. I declare that I am not married and if I was previously married, I am now legally divorced from my previous spouse. I confirm that the person named below is dependent on me.”

6. In July 2014, the Old Section underwent a buy-out. As a result, benefits accrued before 6 April 1978 were insured with Rothesay Life and separated from the New Section benefits of the MNOPF.
7. Mr Y died on 26 January 2017. Rothesay Life paid Mrs Y a lump sum death benefit of approximately £5,000 in respect of Mr Y's pensionable service under the Old Section. No death benefits were paid to Mrs Y in respect of Mr Y's pensionable service under the New Section.
8. In a telephone call to Mrs Y's daughter on 21 March 2017, the Trustee explained that Mrs Y was not eligible for a spouse's pension because Mrs Y was not legally married to Mr Y at the time of his death.
9. On 17 May 2017, Mrs Y's financial advisers (**Elite**), sent a letter to the Trustee asking it to reconsider its decision. It said:

“Mr Y and Mrs Y met in 1977 and were living together by 1979. They bought their first property together in 1980. This year was significant because it also bought [sic] them their first child, a daughter. Together with Mrs Y's eldest daughters from a previous relationship; they lived together very happy as a family. Tragically Mrs Y's oldest daughter died in 2010 after being terminally ill and Mr Y helped her [sic] comfort Mrs Y through this awful time...As you can see...your employee Mr Y and our client Mrs Y have experienced more together than most couples whether married or unmarried will have experienced in their entire lives...Based on all of the above; I strongly urge you to review your decision as Trustee and decide this matter showing compassion for a pensioner in her 80's who has lost her life partner.”

10. On 31 May 2017, the Trustee responded to Elite. It explained that while it fully appreciated its (Elite's) points, under the Rules there was no provision to pay a dependant's pension in cases where the dependant was not legally married to the member immediately before the member's death. It also added that it would be a breach of its duty if the Trustee paid benefits to Mrs Y that she was not entitled to.
11. On 5 June 2017, Elite sent the Trustee a letter raising further points. It said that when the MNOPF changed from the “Old” to the “New” section, the Trustee should have advised all members of the implications of not being legally married. It asked for evidence to show that sufficient information had been provided to Mr Y at the time of those changes. Elite asserted that, had Mr Y been informed of the implications, he would have married Mrs Y.

12. On 22 June 2017, the Trustee replied to Elite and said:

“...there was no provision to provide a pension to an unmarried partner in either the Old Section or the New Section. The provision for the payment of a pension to an unmarried partner (at the discretion of the Trustee) was introduced in relation to the Old Section by a Deed of Amendment dated 22nd July 2002. There is currently no such provision in relation to the New Section...In Section 2 of the form, and the notes that accompany section 2, explicit reference is made to the fact that a partner’s pension may only be considered by the Trustee in respect of the Old Section. In addition, the retirement information provided to Mr Y in 2011 (also attached) made specific reference to the benefit provisions available to an unmarried partner in respect of the Old Section.”

13. Unhappy with the Trustee’s decision, Mrs Y raised a formal complaint in December 2017 under the MNOPF’s two-stage internal dispute resolution procedure (IDRP). In her submission, Mrs Y said that she fell under the definition of a widow because she lived with Mr Y as husband and wife even though they were not legally married. She said that the only correspondence she found for Mr Y in relation to the pension benefits was a Statement of Benefits dated 2011, which showed a small note in respect of dependant’s pension. She believed that the note was not sufficient to have informed Mr Y of the implications of not being married to his partner. If it had been sufficient, Mr Y would have made a decision to marry her. She also asked the Trustee to consider providing her with a spouse’s pension under the New Section by exercising the discretion to provide augmented or additional benefits under Rule 34 of the Scheme’s Trust Deed and Rules dated 1999 (Details of Rule 34 are in Appendix 2). Mrs Y said she believed that given she was 82 years of age, the cost to the Scheme of providing her with a spouse’s pension under the New Section would be relatively low.

14. On 5 January 2018, the Trustee sent Mrs Y a response under Stage one of the IDRP that maintained its previous stance and added:

“In terms of Rule 34.0 of the MNOPF Trust Deed and Rules, I can confirm that this is used in very exceptional circumstances only and would not typically apply where the provisions of the Trust Deed and Rules have already been met.”

15. Mrs Y further appealed in February 2018 under Stage two of the IDRP. In her appeal, Mrs Y’s legal representative asked the Trustee to reconsider its decision, taking into account:

- Mrs Y’s age and health condition;
- the fact that the Scheme had made a “significant profit” from Mr Y’s death, part of which could be used to pay Mrs Y spouse’s benefits under the New Section;
- the fact that Mr Y “clearly wanted to protect” Mrs Y, as was evidenced by him nominated her, on the Form to receive “100% of his benefits”; and

- the fact that Mrs Y “[fell] within the definition of “widow” and should be considered as Mr Y’s wife / widow”.
16. Mrs Y’s legal representative asked that, if the Trustee did not accept that Mrs Y was Mr Y’s wife / widow, it should provide its reasons for that. It should exercise its power under Rule 34, to provide Mrs Y with a spouse’s pension under the New Section.
17. On 10 October 2018, the Trustee Board met and considered Mrs Y’s complaint. The papers that were considered by the Trustee Board at the meeting, in relation to her complaint, included a copy of the correspondence between Mrs Y, her legal representative and the Trustee, in relation to both stages of her IDRPs.
18. The minutes of the Trustee Board’s consideration and decision in respect of Mrs Y’s Stage 2 IDRPs are as follows:
- “In respect of Mr Y (deceased) and his long-term partner, Mrs Y, it was recognised that the MNOFF Trust Deed and Rules only allowed a spouse’s pension to be paid from the Defined Benefit Section of the Fund to a legally married partner. To award such a benefit to Mrs Y would not, therefore, be in accordance with the Trust Deed and Rules. It was also noted that Rule 34 does not typically apply where the provisions of the Rules have already been met. Having considered the relevant factors relating to the complaint, the Trustee Board agreed not to uphold the member’s complaint and authorised the Chair to sign the letter, as drafted, on behalf of the Board.”
19. On the same day, the Chair of Trustees sent Mrs Y a response under Stage two of the IDRPs that maintained its previous stance and explained:
- “The Trustee must act in accordance with the MNOFF Trust Deed and Rules...and has a duty to all its members to pay the benefits in accordance with the Trust Deed and Rules...Rule 34 is used in exceptional circumstances only and not where the benefit entitlement is already clear and correct in accordance with the Trust Deed and Rules.”

Summary of Mrs Y’s position

- Mr Y had worked for the merchant navy since 1974 and had paid into the MNOFF until he retired in 2012, so she expected to be entitled to receive a survivor’s pension after Mr Y’s death.
- Following Mr Y’s death, she received a lump sum payment of approximately £5000 from the “Old Section”, so she expected a pension payment from the “New Section” too.
- Although she was not legally married to Mr Y, they had lived together as husband and wife for 38 years, so she should be entitled to a spouse’s pension.
- MNOFF has been discriminatory towards her because she was not legally married to Mr Y, even though she was using his surname.

- This situation has caused her a great deal of stress and has had an impact on her financial situation. She has been forced to release equity from her home in order to meet her daily living expenses.
- Had she and Mr Y known that a spouse's pension was only paid to legally married couples, they would have decided to become legally married.
- The Trustee should have exercised its discretion under Rule 34, taking account of: her age of 84; her ill health; and the fact that she had undergone heart surgery and was recovering from a fractured shoulder and eye surgery.
- The key issue is that the "Old Section" changed into "New Section" and not enough has been done by MNOFP regarding informing all scheme members about the implications of not being married.
- The only correspondence she found in Mr Y's records, was a statement of benefits dated November 2011 where MNOFP defined dependant's pension, which is irrelevant to her situation.
- The cost of providing a survivor's pension to her would be insignificant to MNOFP, due to her old age.
- She believes the case of *Brewster v Northern Ireland Local Government Officers' Superannuation Committee [2013] NICA 54 (Brewster)* has a bearing on her complaint.
- She falls within the definition of "widow" as she has lost her partner. As Rule 8.1 refers to a "widow", Mrs Y believes that she meets the criteria for entitlement to a pension under Rule 8.1.

Summary of the Trustee's position

- Mrs Y and Mr Y were not legally married at the time of Mr Y's death, therefore Mrs Y is not eligible under the Trust Deed and Rules to receive a spouse's pension.
- The Trustee's discretionary power to pay survivor's benefits to an unmarried partner was introduced in respect of the Old Section, by a deed of amendment dated 22 July 2002. While the Trustee considered it appropriate to introduce that discretion to the Old Section, which was well-funded at that time, the Trustee did not consider it appropriate to introduce such a discretion to the New Section as it had, in 1999/2000, become underfunded for the first time. Although the provision would have been discretionary, the Trustee did not want to introduce a power that could unfairly raise expectations that it would be exercised. Therefore, the discretionary power was introduced to the Old Section only.

- The Trustee relies on the definition of a widow/widower under the standard English Law dictionary that says:

“A widow is a woman whose husband died while she was married to him and who has not since remarried. A widower is a man whose wife died while he was married to her and who has not since remarried.”

- Mr Y would have had access to the MNOF website at the time, which explains the provision for unmarried partners' pensions:

“...this benefit does not apply to members with benefits accrued from 2 April 1978 to 31 March 2016.”

- The Trustee has no specific policy in relation to the exercise of its discretion under Rule 34 or generally, but follows the guidance in case law on the exercise of its discretions. It understands that it must:
 - direct itself correctly in law;
 - take into account all relevant factors and no irrelevant ones;
 - ask itself the correct questions; and
 - arrive at a decision that is not perverse.
- The Trustee recognises that Rule 34 grants a wide discretion to augment any pension or benefit payable under the Rules or to pay a pension or benefit otherwise than in accordance with the Rules, subject to receiving any additional payment into the MNOF as the Scheme Actuary advises to be necessary. This power is entirely at the discretion of the Trustee and no member is entitled to receive additional or augmented benefits under Rule 34.
- The discretion under Rule 34 “is used only in exceptional circumstances and generally only where the benefit entitlement under the Rules is unclear. This does not mean that the Trustee considers that [Rule 34] cannot apply when the other provisions of the Rules have been met. Rather, it is the case that, as a matter of fact, this discretion is not routinely exercised, unless the application of the Rules is unclear in the circumstances under consideration. The Trustee has a duty to its members as a whole and does not consider that the wider membership of the MNOF would be best served if the Trustee were to regularly exercise its discretion under Rule 34 to provide benefits to individuals who would otherwise not be entitled to such, particularly if the Scheme remains in deficit.
- In this case, it is clear under the Rules that Mrs Y is not entitled to a spouse's pension in relation to the deceased's New Section benefits. In the normal course of events, therefore, exercising the discretion under Rule 34 would not be contemplated. However, when this case was brought to the Trustee Board's attention under the IDRP process, the Trustee Board was specifically asked to consider whether to exercise its discretion under Rule 34, which it did.

- The minutes of the Trustee Board meeting documenting the decision of the Trustee note that the Trustee Board “considered the relevant factors relating to the complaint” before making its decision.
- The board papers show the factors and information taken into account by the Trustee when making its decision not to exercise its discretion under Rule 34. This included the reasons for referral to the Trustee contained in Mrs Y’s IDRPs Stage 2 application form, which contained Mrs Y’s submissions in relation to her age and health.

Ombudsman’s decision

20. Under Rule 8.1 of the New Section, a spouse’s pension “shall be paid to a widow or widower”. All of the dictionary definitions of “widow” that I have seen refer to a woman whose “spouse” or “husband” has died. I cannot see that “widow” could be interpreted to include an unmarried surviving partner. Rule 8.1 also refers to the benefit as being payable only at the Trustee’s discretion in cases where the pensioner’s death occurs within six months of the marriage. I consider that this adds weight to the argument that there is a requirement for the member’s surviving partner to have been legally married to the member in order to benefit under Rule 8.1. On that basis, I do not consider that Mrs Y has any entitlement to a spouse’s pension under Rule 8.1, as she was not legally married to Mr Y. I find that the Trustee has applied Rule 8.1 correctly.

21. Consequently, I have considered the provisions of Rule 34.

22. In cases such as this, where the decision whether to exercise a discretion to augment benefits or provide benefits in addition to those otherwise payable under the Rules is an absolute discretion to be exercised by the decision-maker, my role is to consider whether the rule was correctly interpreted and the decision of the Trustee was reached in a proper manner. I may only interfere with the exercise of the Trustee’s discretion if the Trustee has acted improperly in reaching its decision in the sense that it had failed to:

- direct itself correctly in law (in particular it must adopt a correct construction of the Rules);
- take into account all relevant matters and no irrelevant ones;
- ask itself correct questions; and
- arrive at a decision that is not perverse.

23. The Trustee has explained that it would not routinely have considered applying its discretion under Rule 34 in Mrs Y’s case, as the provisions of the Rules (i.e. that she was not entitled to a spouse’s pension under Rule 8.1) were clear. However, when it was asked to do so, it had recognised the scope of the discretion under Rule 34 and

proceeded to consider it. It explained how this is evidenced by the supporting Board papers provided to the decision maker at the second stage of the IDR. Having considered these papers and the manner in which they are referred to by the minutes of the decision made, I am persuaded by these arguments. I am therefore satisfied that the Trustee did consider the scope of the Rule 34 discretion and decided not to exercise it on the facts of Mrs Y's case. As long as the Trustee has considered all the relevant factors, it can decline to exercise its discretion in Mrs Y's favour. I consider that I have seen sufficient evidence to conclude that the Trustee had considered the relevant factors before arriving at its decision.

24. A perverse decision is taken to mean a decision that no reasonable decision maker, properly directing itself, could arrive at in the circumstances. On the facts, the Trustee could have made a different decision, but I am satisfied that the one which it made fell within the bounds of what was reasonable. I do not consider that the decision was perverse in that sense.
25. For these reasons I am satisfied that the Trustee's decision not to grant Mrs Y benefits was made reasonably and in line with the Rules and find no basis to direct the Trustee to make a fresh decision under Rule 34.
26. Therefore, I do not uphold Mrs Y's complaint.

Karen Johnston

Deputy Pensions Ombudsman
14 January 2020

Appendix 1

Relevant extracts from the Rules:

8.1 Widow's/Widower's pension

"There shall be paid to a widow or widower a pension equal to one -half of the pension that was payable to the Pensioner but ignoring any commutation, surrender or reduction in pension on early retirement or adjustment in pension to take account of the basic state pension or...

Death within six months of marriage

If the marriage shall have taken place after retirement and within six months of death, that part of pension in excess of the GMP payable to the widow or widower shall be payable only to the extent that the Trustees in their discretion may decide."

Appendix 2

27.Rule 34 provides as follows: -

"34.0 PAYMENT OF ADDITIONAL BENEFITS

SUBJECT to such payment into the Fund (if any) as the Actuary may advise to be necessary to meet the additional liability thereby imposed upon the Scheme and the Trustees shall require to be paid, the Trustees shall have power to augment any pension or other benefit payable under the Rules or to pay a pension or other benefit otherwise than in accordance with the Rules providing that in so doing the Trustees shall comply with the requirements of the 1993 Act and shall be bound by the Inland Revenue limits which are set out in the Appendix to these Rules except where the Trustees determine in respect of a Member or a group of Members that the Inland Revenue limits shall not apply or shall apply only to such extent as the Trustees shall determine."