

Ombudsman's Determination

Applicant	Miss C
Scheme	G Group Pension Scheme (the Scheme)
Respondents	1. G PLC (the Employer) 2. Trustees of the Scheme (the Trustees)

Complaint summary

1. Miss C's complaint against the Employer and the Trustees is about their decision on the death in service benefits under the Scheme following the death of Mr Paul Bien.

Summary of the Ombudsman's decision and reasons

2. The complaint should be upheld against both the Employer and the Trustees because they both misinterpreted the Rules, and the Employer failed to make sufficient enquiries before deciding who Mr Bien's relatives and dependants were.

Detailed Determination

Relevant rules

3. The relevant rules of the Scheme are those dated 14 September 2012 (the **Rules**).

4. Rule 11(E)(1) headed 'DEATH IN SERVICE BEFORE NORMAL RETIRING DATE' says:

"On the death of a Member while in the Service of the Employers on or before the Normal Retiring Date...the Member's legal personal representatives shall be entitled to the return of all the Member's contributions to the Scheme..."

On the death of a Member...for the benefit payable under this paragraph only by virtue of Sub-rule 8(C) while in the service of the Employers on or before the Normal Retiring Date...there shall be held by the Trustees upon the trusts set out in (J) of this Rule a sum equal to an amount which when aggregated with any lump sums arising on the death of the Member under a Former Scheme...is equal to three times Death Benefit Pensionable Earnings or, if greater, three times the Member's Annual Earnings applicable on the day of the Member's death."

5. Rule 11(G) (3) headed 'FINANCIAL DEPENDANT'S PENSION OPTION' says:

"At the request of the Employers in any particular case after the death of the Member concerned the Trustees may in their discretion extend the provisions of this sub-rule that it shall be read and construed as though the references therein to "Married Member" included a Member who is not a Married Member...such person as was in the opinion of the Trustees financially dependent on the Member at the date of death provided that (a) where any such person was in the opinion of the Trustees less than wholly dependent on the Member the annual amount of pension shall be reduced by such amount as the Trustees may agree with the Employers having regard to the degree to which such person was so dependent on the Member at the date of death..."

6. Rule 11(J) headed "TRUSTS UPON WHICH DEATH BENEFITS TO BE HELD" says:

"A benefit which is to be held upon the trusts set out in this sub-rule shall be held by the Trustees upon the following trusts, namely:-

(a) (i) with power to pay or apply the said sum or any part thereof in such shares and in such manner to or for the benefit of any one or more of the Member's Relatives and Dependants living at the date of death as the Employers shall within twelve months of his death determine (which power shall be inapplicable in respect of the whole or any specified part of the said sum in any case where the Employers notify the Trustees in writing that they have no intention of making a determination in respect thereof)

and

(ii) with power exercisable at the request of the Employers within twelve months of the date of the Member's death to apply at the absolute discretion of the Trustees the said sum or any part thereof in or towards reimbursing any person who produces evidence to the satisfaction of the Employers that he has paid such funeral expenses (which said power shall be inapplicable in any case where the Employers make a determination under (i) above in respect of the whole of the said sum or where the Employers notify the Trustees in writing that they have no intention of requesting the Trustees to exercise their power under this sub-paragraph (a)(ii))”

7. “Dependants” as defined in rule 11(J) are:
“...all persons to whose advancement or support the Member shall have contributed in his lifetime or with whom the Member shall have resided and any person...whom the Member shall by notice in writing have requested the Principal Company or any of the Employers or the trustees of this Scheme or another scheme of any of the Employers to consider as a recipient of any sum payable under the trusts thereof.”

Material facts

8. Mr Paul Bien, Miss C's partner, was a member of the Scheme when he suddenly died on 1 January 2014.
9. Before his death, Mr Bien had completed a nomination form, dated 1 April 2009, nominating Miss C as a recipient of any lump sum death benefit payable under the Scheme. The nomination form contained a standard clause which stated:
“In the event of my death I would like the person(s) named above to be considered by my Employing Company as recipient(s) of any lump sum death benefit payable from the [Scheme]. This form supersedes any previous nomination form.”
10. On an employee emergency contact form, Miss C is shown as the person to contact in the event of an emergency but Mr K Bien is shown as the next of kin contact.
11. In an internal email, dated 16 January 2014, from the Head of HR in the Employer, Ms E, to the Pensions Technical Manager, Mr B, the former informed the latter that the monies due in connection with the death of Mr Bien was to be paid to Mr Bien's father. The reason given was that Mr Bien had never lived with Miss C at the same address. The view was Mr Bien's closest family were his father and brother, and in the absence of a will the monies should be paid to his father.
12. On 1 February 2014, Miss C wrote to the Employer saying that she had been advised by a solicitor to make contact them with regard to Mr Bien's death. She said that Mr Bien had signed a nomination form leaving his pension to her as his closest friend.

13. On 12 February 2014, the death benefit lump sum was paid to the solicitors dealing with Mr Bien's estate.
14. On 18 March 2014, Miss C's solicitor, Mr F, sent Mr B an email asking for a full response to an earlier email he had sent and for a copy of the Scheme's internal dispute resolution procedures (**IDRP**). Mr B responded by email on 19 March 2014 attaching a copy of the Rules and saying that the case was a long way from the IDRP stage.
15. There was a further exchange of emails between Mr F and Mr B. Mr F said that Miss C fell clearly within the definition of "Dependants" and asked for a copy of the nomination form Mr Bien had completed.
16. On 25 March 2014, in an email to Mr F, Mr B said that in order to establish Miss C is a dependant she needed to provide evidence that proves she is and no evidence had been provided. He added that the Rules mentions support and residency and evidence of these are required.
17. Mr F responded saying that he disagreed with Mr B and said:

"Whilst residence or support is mentioned in the first part of the clause, the second part, which is the part that clearly applies to my client, makes specific allowance for persons who do not meet these qualifying criteria to be considered by the Trustees.

I do not intend getting into arguments about semantics when the import of the clause is so very clear.

I am still waiting for a copy of the twice acknowledged Letter of Wishes."
18. On 26 March 2014, Ms L, the HR advisor at the Employer, sent Mr F an email saying that she was not at liberty to let him have a copy of the nomination form Mr Bien had completed.
19. On 27 March 2014, in response to an email from Mr F, Mr B said that evidence needs to be produced that Miss C had a relationship with Mr Bien, namely that they lived together, joint names on utility bills and that he supported her financially. He explained that the nomination form was not a binding document and only used as a guide for the employer to make a decision.
20. On 3 April 2014, Mr F wrote to Miss C saying:
 - a. after extensive email correspondence with the Employer, he has managed to obtain a copy of the section of the Rules that deals with the benefits payable on the death of a member;
 - b. she had no interest in Mr Bien's pension which formed part of Mr Bien's estate;

- c. the nomination form which Mr Bien had completed was merely to advise the Trustees who the member would like to be considered to receive the benefit in the event of their death;
- d. her only right was to be considered as a potential 'Beneficiary' which, under the Rules, means that she would be equally considered along with the spouse or other relative from which the Trustees will make a decision as to who to distribute the funds;
- e. from the way she has been treated, it is extremely unlikely that the Trustees will execute their discretion in her favour and he had virtually had this confirmed to him in correspondence with Mr B; and
- f. the only avenue open to her would be to make a formal complaint to the Trustees.

21. On 17 April 2014, Miss C wrote Mr B saying:

- a. Mr Bien was estranged from his family not having had contact with them for over 12 years, apart from a telephone conversation with his brother years ago and a short conversation with his father when they were both in the same hospital waiting room;
- b. she and Mr Bien were going to move in together when he retired in May 2014;
- c. the fact that Mr Bien had named her on his nomination form is proof that he wished to leave her his pension, otherwise he would not have taken the trouble to do this; and
- d. if the nomination form is not a legally binding document, someone at the Employer should have informed Mr Bien of this when he completed and signed it.

22. In an internal email dated 25 April 2014 to Ms E, Mr B asked for the evidence the Employer had collected in considering who the death benefit should be paid to in Mr Bien's case. In an email dated 29 April 2014 Ms E responded:

- a. they were informed of Mr Bien's death by a member of his family;
- b. Mr Bien's nomination form was attached;
- c. despite having Miss C as his emergency contact Mr Bien had his father/brother as next of kin – this does not add up with the statement from Miss C that he had "disowned" his family;
- d. Mr Bien never lived at the same address as Miss C;
- e. Mr Bien had no wife or children, his family included his father, brother and sisters who are all blood relatives;

- f. Mr Bien never left a will; and
 - g. there was an internal discussion as to who the death benefit should be paid to and after consideration of the information above, it was agreed that the monies should be paid to Mr Bien's father.
23. On 30 April 2014, Mr B wrote to Miss C repeating what Ms E had told him in her email of 29 April 2014. He said that he had explained to Mr F that evidence needs to be produced that she had a relationship with Mr Bien, which would include evidence that she and Mr Bien lived together, utility bills in their joint names and that he had supported her financially. The Employer was responsible for making the decision on the disposal of the death benefit and no evidence was produced for her to be considered.
24. Miss C made a complaint and Mr B wrote to her on 18 June 2015 saying:
- a. The decision for the disposal of the death benefit lay with the Employer, as outlined in the Rules, and the Employer had investigated the position correctly.
 - b. The evidence on which the Employer had reached their decision was as set out in Ms E's email of 29 April 2014.
 - c. The Rules state that a pension is automatically paid to the legal spouse, but she did not qualify because she was not married to Mr Bien. The Rules do allow a discretionary pension to be paid provided evidence of a financial relationship exists, e.g. joint mortgage, joint bills, savings etc. She was asked to provide evidence of a financial relationship, but had provided no such evidence.
 - d. He did not believe that it was sufficient for her to invoke IDR, when she had been given ample opportunity to provide any evidence she might have.

Summary of Miss C's position

25. Mr Bien was in his home on his own when he phoned for an ambulance, but when it arrived he had already passed away. The police were called and they contacted his brother.
26. Mr Bien's father was Mr Bien's next of kin when he joined the Employer some 40 years ago. Mr Bien's father was not dependent on Mr Bien.
27. She did not live at the same address as Mr Bien, but she was in a relationship with him. They were intending on buying something bigger together after he had retired.
28. She finds it hard to believe that as a named recipient on the nomination form, she was never contacted by the Employer or the Trustees.
29. When she first contacted the Employer, it took two weeks of phoning to actually speak to Ms E. Ms E told her that as she was not a member of Mr Bien's family, Ms E

could not discuss the matter with her. She was informed that she needed to speak to Mr B.

30. She initially wrote to Mr B, but when she did not receive a response, she tried to phone him. Mr B denied receiving her letter and told her to speak to Ms E, who referred her back to Mr B.
31. She understands that she is not entitled to a yearly pension, as she was not married to Mr Bien, but it was his wish that she received the lump sum.

Summary of the Trustees' position

32. The lump sum was paid to Mr Bien's estate based on the Employer's decision.
33. Their legal advisers have confirmed that under the Rules, it is the Employer who are responsible for exercising the discretion as to which one of the member's relatives and dependants should receive the benefit. The Employer then direct them on how to distribute the benefit.
34. Miss C falls under the definition of "Dependant" for the purpose of the rule 11(J) by virtue of being nominated by Mr Bien in his expression of wish form. However, she was not the only recipient of the benefit.
35. In order for the Employer to properly identify and consider the pool of potential beneficiaries, enquiries were made of Mr Bien's family solicitor to establish other potential beneficiaries.
36. The Employer are very conscious of the importance of not simply paying out benefits in accordance with every expression of wish form without making further enquiries. In this case the expression of wish form was dated 2009, so the Employer were concerned that over the passage of time Mr Bien's circumstances could have changed. As a result, enquiries were made of Miss C to try and establish the nature of her relationship with Mr Bien in order to consider the form properly. She was given multiple opportunities to respond to these enquiries but failed to do so.
37. Rule 11(G)(3) provides that at the request of the Employer, the Trustees may at their discretion provide a financial dependant of an unmarried member with the equivalent of a spouse's pension. The enquiries made of Miss C as to the nature of her relationship with Mr Bien were also intended to assist the Employer and the Trustees in determining whether the Trustees' discretion could be exercised in this case. As Miss C failed to provide this information, the Trustees and the Employer were unable to offer a financial dependant's pension to her.

Conclusions

38. In cases such as this, where the decision as to the distribution of the lump sum death benefit under the Scheme is an absolute discretion to be exercised by the decision-makers, the relevant legal principle is by now well-established. I may only interfere

with the exercise of a discretion if the decision-makers have acted improperly in reaching their decision in the sense that:

- a. they failed to take into account all relevant factors or took into account irrelevant factors;
- b. they asked themselves the wrong questions;
- c. they misdirected themselves on a point of law, for example, by adopting an incorrect interpretation of the relevant rule; or
- d. they arrived at a perverse decision, i.e. a decision no reasonable decision-maker, properly advising themselves of all the relevant circumstances, could reach.

39. It is clear from the Rules that it is for the Employer to decide, after making the appropriate enquiries, who the member's relatives and dependants are, and, from the individuals identified, who should receive the lump sum and in what proportions. The question the Employer should have asked themselves is: who were Mr Bien's relatives and dependants at the time he died. As Mr Bien had nominated Miss C as a recipient of the lump sum death benefit, she was a dependent as defined. Mr Bien also had other dependents as defined. In my view, the Employer should have contacted her soon after being notified of his death and before the lump sum death benefit was paid.
40. The lump sum was paid to Mr Bien's estate on 12 February 2014, over a month before they asked her for evidence to show that she was Mr Bien's dependant in the broader sense of whether she had been a co-habitee or financially dependent.
41. The Trustees say that the Employer were concerned that Mr Bien's circumstances could have changed since he completed the nomination form, and as a result made enquiries of Miss C to try to establish her relationship with Mr Bien. I agree that the Employer needed to make enquiries of Miss C in order to decide how to distribute the death benefit as between multiple potential beneficiaries. However, those enquiries should have been made before they decided to whom to pay the benefit and not after.
42. Mr B, who is acting for the Trustees, said in his letter of 18 June 2015 to Miss C that the Employer had investigated the matter correctly. Mr B should have known that as she had been nominated by Mr Bien, under the Rules, she was a dependant and, therefore, the Employer were wrong to ask for proof of residency and evidence of financial support as a condition of establishing dependency. In my view, the Trustees had also misinterpreted the Rules.
43. Therefore, I find that both the Employer and the Trustees misinterpreted the Rules about what was required to prove dependency in the limited sense of being potentially entitled to a death benefit. The Employer failed to make timely enquiries sufficient to satisfy themselves whether Miss C should receive a share of the death

benefit. The Trustees failed to consider whether her complaint about the Employer's decision making process was well made. In my view, the question of whether she could prove residency or financial dependency was not a bar to considering her complaint under the IDRPs rules; she was a person with an interest in the scheme by virtue of being a person potentially entitled to benefits on the death of a member.

44. For the reasons given above, I find that both the Employer and the Trustees have not acted properly in this matter. I therefore uphold the complaint against them.
45. There are some difficulties relating to any directions as the lump sum death benefit has already been paid out. Notwithstanding that, I feel that it is only appropriate to remit the matter to the Employer for reconsideration. I do so without expressing a view on which of Mr Bien's dependants should in fact receive the benefit, a decision which rests properly with the Employer.
46. If on reconsidering the matter the Employer does so properly, then Miss C will have the satisfaction of knowing that, whatever the outcome, her claim as a "Dependant" has been properly considered.
47. If the decision differs from that already made, the Trustees and the Employer will have to decide the extent to which the payment already made is recoverable. If it is not wholly recoverable, the Trustees will then have to consider whether they and/or the Employer are liable for any loss to the Scheme.
48. I recognise that Miss C has suffered significant non-financial loss in the form of distress and inconvenience arising out of the way in which the Employer dealt with her claim. Although the trustee was wrong, in my view, not to admit her complaint formally to its internal dispute resolution process, her distress and inconvenience arose primarily out of the original decision making process adopted by the Employer. I have therefore made a direction below for the Employer to pay her compensation to redress the non-financial loss she has suffered.

Directions

49. I direct that as soon as practicable and in any event within 28 days of the date of this determination, the Employer shall reconsider the distribution of the lump sum death benefit and decide afresh how it should be distributed between Mr Bien's relatives and dependants. I also direct that, within 28 days of the date of this determination, the Employer shall pay Miss C £500 as redress for the non-financial loss she has suffered.

Karen Johnston

Deputy Pensions Ombudsman
20 July 2016