

The complaint

Mrs G complains about how Standard Life Assurance Limited (SA) exercised its discretion to distribute death benefits following the death of her brother, Mr G.

What happened

Mrs G first complained to this service in 2020 about the way SA had exercised its discretion to distribute money following the death of her brother. An earlier decision by another Ombudsman directed SA to exercise its discretion again. This was because SA had not given due weight to an expression of wish form and had assumed Mr G's former wife was financially dependent on him rather than mutually dependent. Having done so, SA reached the same decision as it did when it first exercised its discretion. Mrs G didn't think this was reasonable in the light of the further information that had been considered. She said the decision couldn't be a fresh independent re-exercise as the decision was the same as the one reached on the first occasion based on incorrect documentation.

She said the expression of wish was an up to date one by someone in sound mind and aware they were terminally ill and going through a process of making sure his wishes were up to date. She couldn't understand why SA chose to ignore it. If, when it had assumed the expression of wishes wasn't valid, it decided to distribute in one way how could it then reach the same conclusion when it treated the expression of wishes as valid and having concluded that Mr G's estranged wife was not financially dependent as it had initially thought.

SA said it was satisfied that the fresh consideration made on 26 June 2020 addressed the concerns raised by the first Ombudsman decision made on 8 April 2020. It had correctly documented the expression of wish form and the correct weight had been placed on that information in the process of weighing up all the relevant evidence. It had clarified the relationship between Mr G and his wife as being one of mutual dependency and a fuller rationale for the distribution including the proportional split had been documented. It said the process was one of weighing up all relevant evidence and ignoring irrelevant factors. It was not trying to make any moral judgment about the quality of relationship between Mr G, and his family. It felt its decision was fair and reasonable in relation to all the relevant information it had gathered and documented. As the death benefits didn't fall into the estate it was not under any obligation to disclose these to Mrs G.

My provisional decision

I issued a provisional decision in this case. I said that another Ombudsman made a decision on the first exercise of discretion by SA. He said that:-

- It was not his role to decide if SA made a correct decision nor to replace its decision with his.
- SA wasn't obliged to follow the expression of wish form.
- SA had discretion to decide who to pay and in what proportion

- The Ombudsman needed to decide if SA had exercised that discretion properly, applied due diligence and acted reasonably in reaching its decision.
- He thought the first decision was flawed because it had not at first treated the expression of wish form as valid, although it had been taken into account. He thought the weight attached to the expression of wish must have been affected by the belief it wasn't valid. Further SA had assumed Mr G's wife was financially dependent but it did not seem this had been fully explored.
- There was no reasoning given as to the distribution proposed so the Ombudsman could not safely conclude proper consideration had been given to the issue.
- The Ombudsman directed that SA carry out a fresh consideration of the distribution of these benefits.

I had been provided with a copy of the provisions for the pension plan in question which set out the discretion re payment of death benefits. These said

'we'll decide who should receive a lump sum death benefit, and how much, from the list of beneficiaries described in the rules. But you can help us make this decision by telling us in writing who you'd like us to pay the lump sum death benefit to. This can include the trustees of any trust that you've set up. We will take your views into account but we are not obliged to follow them'.

The circumstances in which the lump sum was to be paid was determined by the scheme rules. In this case it was under a discretionary trust arrangement. The scheme rules defined the class of persons who were eligible to benefit from the exercise of the trustees discretion.

The rules set out the discretion in 8.1, this provided for a payment:-

(1) In accordance with any specific provision regarding payment of such sums under the contract(s) applying to the Arrangements in question; or

(2) If (1) is not applicable and at the time of the Member's death the Scheme Administrator is satisfied that the Member has directed the Scheme Administrator to pay any death benefit to a valid trust under which no beneficial interest in that benefit can be payable to the Member, the Member's estate or the Members legal personal representative to the trustees of the trust; or

(3) If (1) or (2) are not applicable at the discretion of the Scheme Administrator, to or for the benefit of any one or more of the following in such proportions as the Scheme Administrator decides:

(a) any person, charity, association, club, society, or other body (including trustees of any trust whether discretionary or otherwise) whose name the Member has notified to the Scheme Administrator prior to the date of the Member's death.

(b) The Member's Dependants.

(c) The parents and grandparents of the Member or the Member's surviving spouse of civil partner and any children and remoter issue of any of them.

(d) Any person, charity, association, club, society, or other body (including trustees of any trust whether discretionary or otherwise) entitled under the Members will to any interest in the Member's estate

(e) The Member's legal personal representatives

I had seen the fresh record of decision of exercise of discretion. The fresh exercise referred to the expression of wish as valid and noted that Mr G's wife was mutually financially dependent.

As the first Ombudsman in this case said, it was not for me to substitute my decision for that made by SA. However I could consider whether there was evidence it had acted properly and had not taken into account, irrelevant, irrational or improper factors in reaching its decision.

I set out an extract of the '*record of decision – following review dated 22 June 2020*' reasons given for the decision that SA made to distribute the lump sum death benefit.

It said the following:-

'While Mr G's family (father, mother & sister) have made representations that the death benefit should be paid out in accordance with his wishes, Mrs G, through her solicitors, has submitted a claim for the death benefits to be paid in full to her, stating:

Although their client and the deceased were separated, they remained legally married and maintained their jointly owned assets and shared their finances together, to the extent that their client was financially dependent on the deceased.

After their separation, the deceased and their client remained very close, to the extent that each of them helped each other through their respective illnesses.

The solicitors were instructed that it was the deceased's intention that their client is appropriately provided for and is financially secure. In order to facilitate the deceased's intentions, the benefit from this policy ought to be paid to their client.

The Will was executed after the deceased and their client separated and this demonstrates that their client is the majority beneficiary and indeed the residuary beneficiary to the deceased's Estate.

After careful consideration of all the information presented to us by all parties we have decided that there are significant justifications made by Mrs G for the Scheme Administrator to award her a larger share of her late husband's death benefit.'

I thought the reasoning set out reflected irrational and unreasonable decision making relying on irrelevant information for the following reasons:-

- The record of decision stated that the solicitors (this appears to be those for Mrs G, the estranged wife)) were instructed that it was the deceased's intention, the benefit from this policy ought to be paid to their client.

This view is in direct conflict with the proposed distribution set out by Mr G in his expression of wish form regarding his pension benefits on death. The solicitors for Mr G's wife were not the same as those that acted for Mr G and acted to draft the will. As the solicitor referred to, did not act for Mr G, it wasn't possible for it to be '*instructed*' as to his intention or wishes and nor would it have any authority to communicate those intentions or wishes. It was therefore

irrational and unreasonable to rely on that reported instruction as a reflection of Mr G's wishes.

In relying on this information SA had taken into account information that was irrelevant and therefore it acted irrationally and/or unreasonably and/or improperly.

- Further SA says it noted that the will was executed after the deceased was separated from his wife and used this as supporting evidence that he wished his wife to be the majority beneficiary.

However the will was prepared by Mr G's solicitors and signed and dated 29 May 2015. The expression of wish form was also dated around this time. It was signed and dated 24 April 2015 and I understood it was executed after Mr G separated from his wife.

It seemed irrational and/or unreasonable to assume that the will executed at broadly the same time as the expression of wish reflected Mr G's intention to provide for his wife. (This was especially given that pension benefits would not typically fall within his estate and be distributed under the terms of the will). But the expression of wish form, suggested a different distribution and was specific to his pension benefits was not mentioned as a valid indication of his wishes regarding the lump sum death benefits.

It did not therefore seem that SA had exercised its discretion properly.

I understood the benefits had been paid out by SA. Notwithstanding that I proposed to direct SA to re-exercise its discretion.

I suggested it would be helpful and avoid further delay if SA re-exercised its discretion before I issued any final decision.

SA made various comments but then re-exercised its discretion and issued a fresh record of decision dated 3 March 2022 with respect to a re-exercise of its discretion on 28 February 2022. It did not change the proposed proportions in which the lump sum was to be distributed between the beneficiaries.

It said that

' after careful consideration of all the information presented to us by all parties we have decided to exercise our discretion in a manner that does not align with the EOW. This is because we have decided to allocate a greater share of the proceeds to (Mrs G – his estranged wife) based on the evidence of mutual dependency between Mr and Mrs G presented to us – which we consider (in our discretion) to be significant enough for the Scheme Administrator to award (Mrs G estranged wife) a larger share of her late husband's death benefit.'

Mrs G (Mr G's sister) was supplied with a copy of the fresh decision and given the opportunity to comment.

Mrs G submitted further comments and said that until SA properly and professionally perform what the Ombudsman has required of them then this case cannot be closed.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I understand that the distribution by SA is understandably upsetting for Mrs G and her family. However I am not able to direct SA to reach a particular decision or distribution.

I have carefully considered the points raised by Mrs G.

I think the record of decision shows that SA are now accepting the expression of wishes (EOW) as valid but stating their reason for their decision is mutual financial dependence. They are no longer using the will as the reason for the distribution and ignoring the EOW, as was the case under the previous record of decision.

SA have opted not to follow the EOW and are not required to do so. However they must exercise their discretion in accordance with the provisions of the scheme documents.

It is clear Mrs G (the estranged wife) was a dependant by virtue of being the legal spouse because she falls within the relevant sections of the Finance Act 2004 whether or not she was financially dependent.

The Finance Act definition does not make her a financial dependent. Further Mrs G didn't need to be financially or mutually dependant to benefit.

It seems that SA is applying 'financial dependency' in whatever form to differentiate between beneficiaries and to support its decision to distribute in the way it has. I don't think that is unreasonable. Based on the record of decision, I can see that documentary evidence was provided to evidence the financial relationship. I think that is reasonable and it isn't for this service to second guess SA's assessment of that evidence nor to direct how each beneficiary should submit evidence or in what form.

This complaint is about the SA pension scheme so it is not possible to draw conclusions from the decision made by Mr G's employer on the distribution of the death in service benefit where different legal provisions will have been applied.

It is also clear from the record of decision that SA was aware that Mr and Mrs G were estranged at the date of Mr G's, as it clearly states this.

My provisional decision concluded there was evidence of irrationality etc due to two specific issues. Those relating to using the will as an indication of Mr G's intent while disregarding the EOW and secondly considering that the solicitors for Mr G could communicate Mr G's intent. The updated record of decision no longer relies on those issues and SA confirmed it understood the solicitors in question did not act for Mr G.

I did not have an expectation as to the exact outcome of the re-exercise of discretion. This service cannot direct SA to reach a particular conclusion. It is therefore possible for it to re-exercise its discretion and reach the same proposed distribution as on earlier occasion.

I have reviewed the fresh record of decision. Based on the new record of decision I don't have reasonable grounds to conclude that SA has not properly exercised its discretion even though it has reached the same decision regarding distribution as it did in its previous decisions.

Putting things right

Based on the new record of decision I don't have reasonable grounds to conclude that SA has not properly exercised its discretion.

My final decision

I cannot reasonably conclude that SA has acted improperly in the exercise of its discretionary power to distribute the lump sum death benefit following Mr G's death.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 4 May 2022.

Colette Bewley
Ombudsman