



Superannuation
Complaints
Tribunal

SCT Quarterly
Bulletin

Issue No. 57

1 July 2009 – 30 September 2009

Chairperson's Report

Conciliations

Over the last few years the Tribunal has seen an increasing number of complaints being successfully resolved at conciliation, which the Tribunal considers is the most effective way of resolving complaints.

However, in a minority of cases, trustees and insurers are still not adequately prepared for the conciliation conference.

The Tribunal is under a statutory obligation to try to resolve complaints within its jurisdiction by conciliation (see section 27 of the *Superannuation (Resolution of Complaints) Act 1993* (Cth)). The Tribunal may require parties to attend a conciliation conference (subsection 28(2)), and expects that all parties attending the conference have authority to resolve the complaint by settlement. The Tribunal also expects that parties attend with an open mind to exploring and discussing the issues.

Recently, there has been an increase in the number of conciliation conferences that have had to be adjourned in order for the trustee or the insurer to obtain further information, which in the Tribunal's opinion should have been known prior to the conference. It is imperative that a thorough investigation of the complaint is carried out by the trustee and/or the insurer prior to the conference. It is simply a waste of resources for parties to attend the conciliation conference and then adjourn the conference for further investigation if that investigation should have occurred prior to the conference. Adjournments should only occur in exceptional circumstances – the purpose of the conference is to resolve the complaint, not as a "fact finding" exercise.

Death benefit correspondence

Recently the Tribunal has received death benefit complaints where it has been discovered that the trustee's claim staking letters and letters advising of decisions in relation to the distribution of death benefits were issued/posted well after the date on the letters.

When calculating the 28-day period to establish jurisdiction, in situations where there is no direct evidence of the receipt date, the Tribunal relies on section 29 of the *Acts Interpretation Act 1901* (Cth) which essentially states that provided the notice has been properly addressed and prepaid (stamped), notice will be deemed to have been effected 'at the time at which the letter would be delivered in the ordinary course of post' unless the contrary (i.e. non-delivery) can be proven.

Because strict time limits on the making of complaints to the Tribunal are prescribed, trustees and their administrators should have procedures in place to ensure that correspondence relating to death benefit distribution decisions are issued or posted on the date of the letters or the following day at the latest. If delays occur in issuing a letter, the date should be amended to reflect the date it is actually posted.

A simple way for trustees to avoid problems of mail delivery is to send all notices to potential beneficiaries by registered mail. As the 'prescribed period' of 28 days is calculated from the date of *receipt* of the notice, there will be probative evidence provided by Australia Post to support the receipt date of the notices.

Farewell

On 30 September 2009, Katy Adams' appointment as Acting Deputy Chairperson expired. Also on that date, Katy retired as the Tribunal's Legal Counsel.

It is difficult to concisely describe the enormous contribution that Katy has made to the Tribunal and the assistance she has provided to each of its Chairs since her first appointment as a part-time member in August 1997. In 2005, at the request of the then Chairperson, she took on the role of Acting Legal Counsel when the former Legal Counsel went on long term leave, taking on the role substantively in 2007. Similarly, she agreed to act as Deputy Chair when the former Chair of the Tribunal retired in September 2007. Katy has also acted as Chair of the Tribunal at various times.

Happily, Katy is continuing her role as a part time member.

Quarterly Statistics

During the quarter, the total number of written complaints received by the Tribunal increased by 5.5% compared to the previous quarter. The number of telephone enquiries rose by 11.2%.

The number of complaints within jurisdiction relating to fund administration as a percentage of total complaints fell for the first time since the onset of the global financial upheaval to 50.9% of all complaints during the quarter (last quarter 64.7%). Complaints about death benefit distributions increased to 33.7% (last quarter 24.1%) of all complaints. Complaints about disability benefits comprised 10.5% of total complaints.

The number of complaints finalised increased by 11.3% for the quarter. At conciliation, the Tribunal achieved a settlement rate of 59.8%. The number of cases where an outcome is pending rose by 25%.

Twenty determinations were issued during the quarter (compared with 26 for the last quarter). The Trustee's decision was affirmed in 70% of these cases.



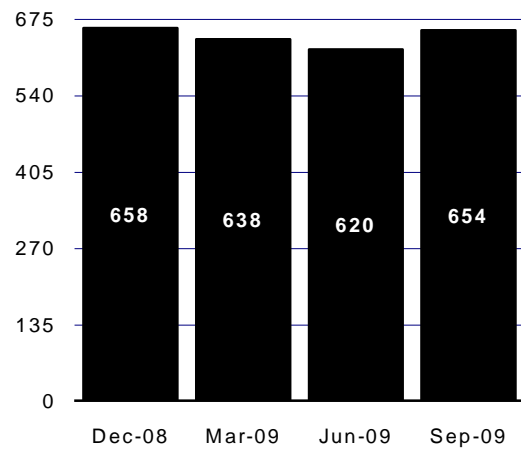
**Jocelyn Furlan
Chairperson**

Performance

Statistical Overview

Written Complaints

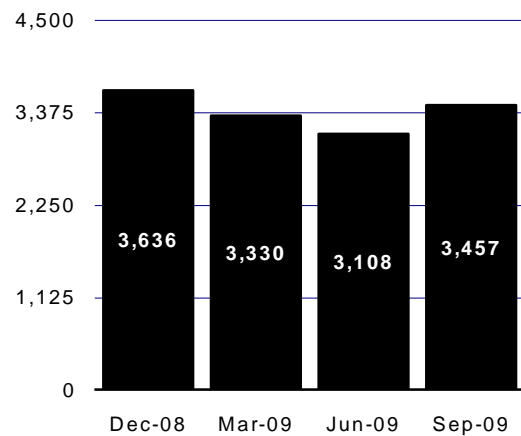
This quarter, the Tribunal received 654 written complaints (last quarter – 620), which is an increase of 5.5% compared with the previous quarter.



Telephone Enquiries

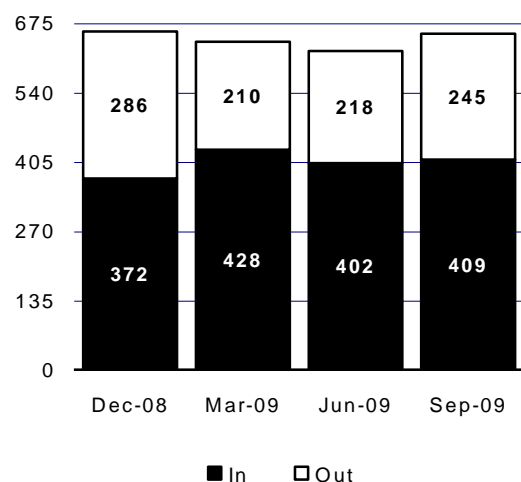
The Tribunal received 3,457 telephone calls this quarter (last quarter – 3,108), which is an increase of 11.2% compared with the previous quarter.

The Tribunal dealt with a wide range of enquiries, the most popular questions were complaint related enquiries (24.6%), followed by requests for information about the Tribunal itself (14.1%) and financial hardship enquiries (8.7%).



Jurisdiction

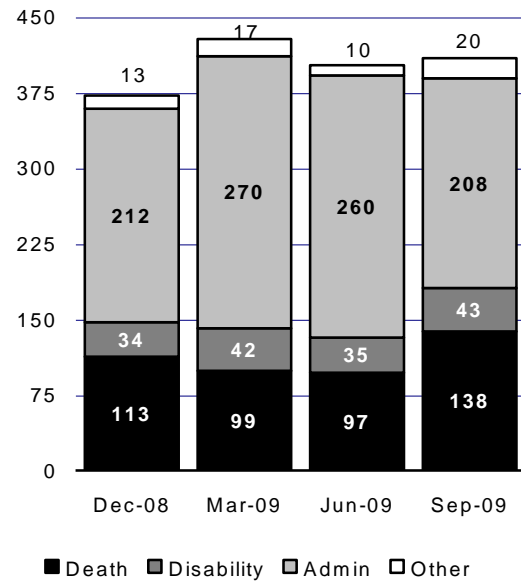
Of the 654 written complaints received this quarter, 409 (62.5%) complaints were within jurisdiction (previous quarter – 64.8%). Of the 245 complaints closed as outside jurisdiction, 131 (53.5%) were closed pursuant to s.19 of the SRC Act because the complainant had failed to lodge a complaint with the trustee prior to lodging a complaint with the Tribunal, (last quarter – 76.6%).



Nature of Written Complaints Within Jurisdiction

Complaints fall into four major categories – ‘Death’, ‘Disability’, ‘Administration’ and the ‘catch-all’ category of ‘Other’.

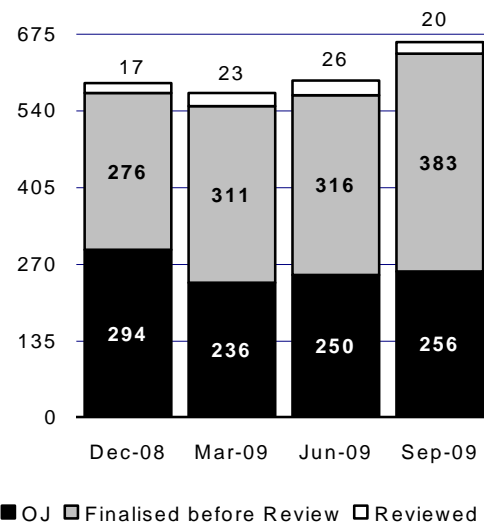
Leaving aside the ‘Other’ category, ‘Administration’ complaints comprised the largest category of all written complaints received within jurisdiction – 50.9% (last quarter – 64.7%). ‘Death’ complaints made up the second-largest category at 33.7% (last quarter – 24.1%), followed by ‘Disability’ at 10.5% (last quarter – 8.7%).



Complaints Finalised

The Tribunal finalised 659 written complaints this quarter, up from 592, or 11.3%, in the last quarter, including some complaints carried over from the previous quarter.

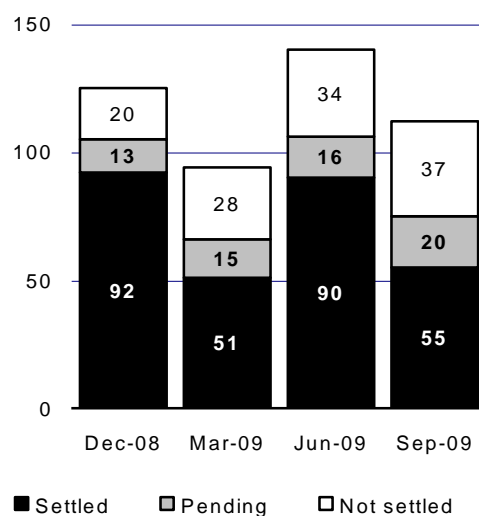
Of the 659 finalised complaints, 3.0% were finalised at review (last quarter – 4.4%), 58.1% were finalised at the inquiry and conciliation stage (i.e., prior to a review hearing) (last quarter – 53.4%) and 38.9% were outside jurisdiction (last quarter – 42.2%).



Conciliation Conferences

The Tribunal conciliated 112 cases in the quarter, a decrease of 20.0% on last quarter's 140.

Of the 92 cases concluded, settlement was achieved in 55, resulting in a settlement rate of 59.8% (last quarter – 72.6%). The outcome is pending in 20 cases (17.9%) compared to 16 cases (11.4%) for last quarter.



Nature of Conciliation Cases

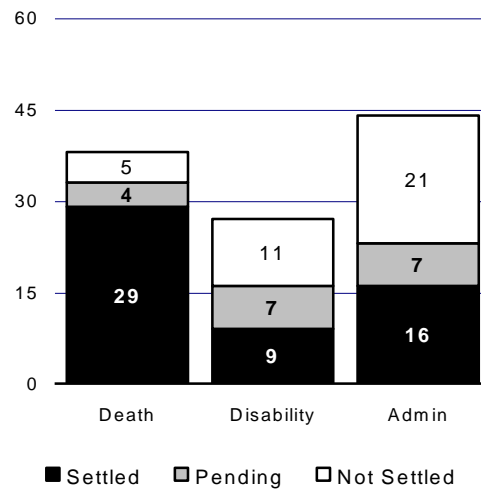
The categories of note in the quarter are as follows:

Death Benefits – Of the 34 concluded cases, 29 (85.3%) were settled.

Disability – Of the 20 concluded cases, 9 (45.0%) were settled.

Administration – Of the 37 concluded cases, 16 (43.2%) were settled.

Other – Of the 3 matters conciliated one was settled.



Review Determination Outcomes for the Quarter

The Tribunal issued 20 determinations this quarter (last quarter – 26 determinations).

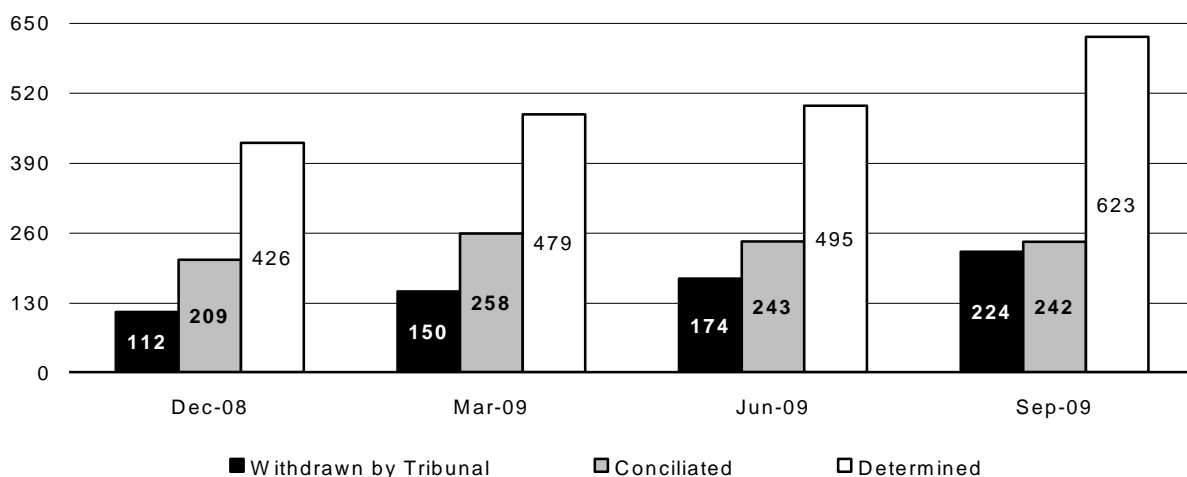
The largest category of complaints determined at review was death complaints – 10 (50.0%). Disability complaints made up the second largest category – 8 (40.0%), followed by administration complaints – 2 (10.0%).

	Death		Disability		Admin		Other		Total		
	Qtr	YTD	Qtr	YTD	Qtr	YTD	Qtr	YTD	Qtr	YTD	YTD %
Affirmed	8	8	5	5	1	1	0	0	14	14	70.0
Remitted	0	0	0	0	0	0	0	0	0	0	0.0
Varied	1	1	0	0	0	0	0	0	1	1	5.0
Set aside	1	1	3	3	1	1	0	0	5	5	25.0
Total	10	10	8	8	2	2	0	0	20	20	100.0

70.0% of Trustee decisions were affirmed during the quarter, compared with 76.9% in the June quarter and 78.3% in the March quarter.

Efficiency

Median number of days from receipt of complaint to date closed.



Recent Determinations of Interest

Death benefit distribution – de facto spouse; legal personal representatives; parents of the deceased; financial dependency; purpose of superannuation - D08-09\084

The Complainants were the de facto spouse of the Deceased Member and his sisters, who were the legal personal representatives of his estate.

In December 2007, the Trustee advised that it proposed to pay the death benefit to the Deceased Member's de facto spouse as an "interdependent" (50%) and to the sisters as the executors of his estate (50%). Each of the Complainants objected to the proposed distribution. The sisters of the Deceased Member disputed the existence of a dependency relationship between the Deceased Member and the first Complainant and sought that the entire death benefit be paid directly to their Mother and Father.

The Deceased Member died in December 2006. By a document dated January 2006, the Deceased Member apparently nominated his de facto spouse as the preferred beneficiary to receive his superannuation benefit. However, there was a dispute as to the validity of the beneficiary form because the de facto spouse rather than the Deceased Member signed it. The Tribunal held that the nomination form was not binding.

In November 2000, the Deceased Member prepared a Will in which he appointed his sisters as executors. He bequeathed his firearms to his brother and the residue of his estate equally to his sisters.

In reviewing whether the Trustee's allocation of the death benefit was fair and reasonable, the Tribunal considered the relationship between the Deceased Member and each potential beneficiary.

The Tribunal accepted that there was sufficient evidence that the first Complainant

was in a de facto relationship with the Deceased Member at the time of his death. Although his family disputed this relationship, the Tribunal found that they were living together at the date of his death and had been sharing their living expenses and some financial resources. The lack of any reporting of the relationship by the Deceased Member on his tax returns or on Centrelink paperwork did not indicate the absence of a relationship between the parties. The Tribunal noted that even if there was not a de facto relationship between the parties, the Complainant and the Deceased Member were at least in an interdependency relationship.

The Tribunal also considered that both the Mother and Father, who lived apart, were partially financially dependent on the Deceased Member. The Deceased Member worked regularly and substantially on renovating his Mother's house, as well as purchasing materials for the renovations to her property from time to time. The Deceased Member also provided financial and physical assistance to his Father. Although he only visited his Father three to four times per year, during those visits he would buy food and farm supplies for his Father, help him with physical jobs around the farm and pay for some bills such as the maintenance of a telephone line.

The Tribunal was satisfied that both the Mother and Father could have a reasonable expectation that the support and assistance, particularly in the form of labour, would have continued had the Deceased Member not died.

In its deliberations, the Tribunal reiterated that the purpose of superannuation is to provide benefits for those who had a reasonable expectation of financial support from the Deceased Member in retirement had the member not died.

Under the Trustee's proposed distribution, 50% of the benefit would be paid to the estate for the benefit of the sisters, neither of whom

had any dependency on the Deceased Member. Further, none of the benefit would be paid to the Mother and Father, who were in a dependency relationship with the Deceased Member.

The Tribunal set aside the Trustee's decision and substituted its view of a fair and reasonable distribution of the death benefit. The Tribunal determined to allocate 70% of the death benefit to the first Complainant, the de facto spouse, on the grounds that she had the most significant dependency on the Deceased Member and it was reasonable to expect that this would have continued after his death. The Tribunal determined to pay 20% of the death benefit to the Mother because of the loss of value of the future work on her house and the regular support provided by the Deceased Member. For the same reasons, the Father was entitled to receive 10% of the death benefit, slightly less than the Mother's entitlement because the support provided by the Deceased Member to the Father was less regular and of less value than that provided to the Mother.

Total and Permanent Disability Benefit – "At Work" requirement; Guidance Note No 11 issued by the Investment and Financial Services Association - D08-09\088

In October 2006, the Trustee advised the Complainant that it had accepted her claim for a permanent disability benefit. The Complainant queried the amount of the insurance component and in May 2008, was advised by the Trustee that it would pay her an additional amount. The Complainant sought the balance of the cover payable to her under the Insurance Policy. The Insurer advised the Trustee that it would not accept liability for the claim on the basis that the Complainant was not "At Work" on or after 1 July 2004, the date that it took over the insurance liabilities of the Fund.

The Complainant joined the Fund in 1992. In 2001 she sustained a back injury and in 2003 she suffered pain in her left thumb. She worked normal hours until October 2003

when she reduced her work hours and worked modified duties. In June 2004, the Complainant returned to normal work hours. On 1 July 2004, the Fund ceased to be self-insured and the terms of the new Insurance Policy ("the Policy") took effect. The Complainant ceased work on 26 July 2004 and her employment was terminated in October 2005.

The Insurer advised that the Complainant's claim was assessed under the terms and conditions of the Policy effective 1 July 2004 and the takeover terms set out in Guidance Note No 11 issued by the Investment and Financial Services Association ("Guidance Note").

The terms of the Guidance Note provide that in respect of TPD cover, an incoming Insurer will provide TPD cover on and from the takeover date to all insured members who were "at work" on the member's normal working day immediately preceding the takeover date. The Insurer asserted that the Policy should be read as if it was subject to the Guidance Note.

The Tribunal did not accept the Insurer's position that the Policy should be interpreted according to the terms of the Guidance Note. The Guidance Note states that it applies where insurance cover changes from one Insurer to the other. In this instance, the Fund was previously self-insured and the Trustee was never an Insurer. Nor did the Policy refer to or state that it was subject to the terms of the Guidance Note. In addition, there was no material before the Tribunal to support the Insurer's interpretation that the Policy had an implied "at work" requirement for members such as the Complainant.

In any event, the Tribunal noted that the "at work" requirement in the Guidance Note applies to the day immediately preceding the takeover date, in this case 30 June 2004. The employer provided information that showed that the Complainant was not on sick leave or workers' compensation on 30 June 2004. Therefore, even if the Guidance Note applied,

there was no evidence that the Complainant was not "at work" at the relevant time.

There was no dispute that the Complainant was TPD within the meaning of the Policy from the medical reports available to the Tribunal. The Tribunal therefore considered that the decisions of the Trustee and Insurer to reject the Complainant's claim for a TPD benefit under the Policy were not fair and reasonable in relation to the Complainant in the circumstances.

The Tribunal also determined that interest on the delayed benefit was payable by the Insurer under section 57 of the *Insurance Contracts Act 1984* (Cth). Interest was payable from the date that the Trustee paid the initial sum of the disability benefit because at this point the Insurer had access to all the evidence relevant to this matter and should have paid the benefit had it correctly understood and applied the provisions of the Policy.

Death benefit distribution – spouse; adult children; Will; purpose of superannuation – D09-10\010

The Complainant was the daughter of the Deceased Member and the legal personal representative of his estate. She objected to the Trustee's decision to pay the entire death benefit arising on the death of the Deceased Member to the Spouse. The Complainant sought payment of the benefit to the estate for the benefit of the Deceased Member's three adult children. The Spouse and the Deceased Member's children were joined as parties to the complaint.

The Deceased Member and the Spouse had only been married 17 days prior to the Deceased Member's death. The relationship between the Deceased Member and his Spouse commenced in 2001 and they were married on 23 July 2006. The Deceased Member was diagnosed with cancer on 16 July 2006, shortly before the marriage, and passed away on 9 August 2006.

In reviewing the Trustee's decision, the Tribunal took into account the wishes of the Deceased Member, the financial circumstances and needs of the potential beneficiaries and the nature of the relationship between the beneficiaries and the Deceased Member. In addition, the Tribunal had regard to the nature of superannuation. Superannuation death benefits differ from an estate in that their main purpose is to provide for those beneficiaries who were dependent on a member as at the date of the member's death or could have expected continued support in the future.

On 1 August 2006, the Deceased Member prepared a Will leaving his house and contents to the Spouse and \$5,000 to each of the Stepdaughter and the Stepson. The residual estate was to be divided equally between the Spouse and his three children (which included the Complainant). The Deceased Member did not complete a Fund death benefit nomination form.

The Tribunal considered that the Deceased Member's adult children were eligible to be considered as beneficiaries under the Trust Deed and for the purposes of the SIS Act. However, although the children had a close relationship with the Deceased Member, the evidence before the Tribunal was that the Deceased Member did not provide them with regular financial support prior to his death and they were financially independent adults.

At the time of his death, the Deceased Member was living with his Spouse and they were supporting each other in a close and loving relationship. The Spouse was therefore the only potential beneficiary who was financially dependent on the Deceased Member and who could have expected future support from him had he lived.

In all the circumstances, the Tribunal was satisfied that the decision of the Trustee to pay the entire death benefit to the Spouse was fair and reasonable in its operation in relation to the Complainant and the Joined Parties. The Tribunal affirmed the Trustee's decision.

Benefits - administration error; allocated pension; compensation to member -D09-10\011

The Complainant sought compensation from his Funds regarding the creation of an allocated pension account.

The Complainant decided to consolidate all his superannuation accounts and commence an allocated pension. On 2 July 2007 the Complainant completed the relevant paperwork and forwarded it to the Receiving Fund. The Receiving Fund then took the necessary steps to establish the allocated pension.

On 23 July 2007 the Receiving Fund received a payment from the Paying Fund. When the amount received by it from the Paying Fund was less than the amount estimated by the Complainant in his application form, the Receiving Fund contacted the Paying Fund and it was confirmed on 27 July 2007 that another payment would be forthcoming. Accordingly, the Receiving Fund held off establishing the allocated pension pending receipt of the payment.

On 11 September 2007, further funds were received from the Paying Fund, but not the required rollover paperwork and therefore the allocated pension could not be established. In view of the already lengthy delays and after instructions from the Complainant's adviser, the Receiving Fund established the allocated pension on 13 September 2007 without the additional payment.

Given that once an allocated pension is established, further amounts cannot be added, a second allocated pension was established for the Complainant when the Receiving Fund again received the further amount, with the correct paperwork.

The Complainant argued that the Trustees of the Receiving and Paying Funds were at fault. Both the Paying and Receiving Funds paid the Complainant an amount of compensation. The Complainant settled his complaint with

the Receiving Fund after receiving \$4,066 compensation but sought an additional amount from the Paying Fund, which had already paid him \$500 in compensation.

The Tribunal noted that the payment of further distributions after the closure of an account is a fairly regular event and considered it unfortunate that the Paying Trustee did not include correspondence to its members relating to this possibility, particularly an allocated pension account.

The Tribunal found that the loss to the Complainant was the inconvenience of having two investments rather than one. The Tribunal considered that a trustee, acting fairly and reasonably, would have paid some compensation to the Complainant for the inconvenience. Although a specific value could not be calculated, the decision of the Trustee to pay the Complainant compensation of \$500, taking into account the compensation of \$4,066 paid by the Receiving Fund, was fair and reasonable in relation to the Complainant in the circumstances.

The Tribunal affirmed the Trustee's decision.

Total and Permanent Disability (TPD): medical – resignation; absence through illness or injury; contemporaneous evidence – D09-10\014

The Complainant objected to the Trustee's decision to reject his claim for a total and permanent disability (TPD) benefit.

The Complainant ceased employment with the Employer on 5 January 2004. On 16 August 2004, the Complainant's corporate division membership of the Fund was transferred to the personal division of the Fund. In September 2004, the Fund sent the Complainant a Product Disclosure Statement informing him that a condition of cover in the personal division was that the Complainant was gainfully employed on a full time basis.

In December 2004, the Complainant was diagnosed with a brain tumour. Following the

operation to remove the tumour from behind his eye, he was left with almost total visual loss.

In November 2005, the Complainant made a claim for TPD benefits, which was rejected by the Trustee in April 2006.

The Trustee and the Insurer both stated that the Complainant's entitlement to TPD cover ceased when he ceased work in January 2004, and both further stated that the Complainant was not eligible for cover because the reason he ceased work in January 2004 was because he resigned, not because of illness.

Evidence from the Complainant's Employer also indicated that it was not aware of any medical reasons why the Complainant resigned from his work, nor had he needed any significant time off work for illness preceding his resignation. Further, he had not been on any light or restricted duties whilst he was at work.

The Tribunal considered that while the Complainant's brain tumour may have begun to take effect on his performance in 2003, the length of time between his ceasing work and finally coming to medical attention made it problematic to conclude that he was in fact TPD under the insurance policy, i.e. unable to work because of his illness.

All the evidence from the Complainant that he had symptoms for more than a year before the diagnosis of his illness in December 2004 was gained after his claim for TPD benefits had been rejected by the Trustee. There was no evidence from the Complainant prior to this date that he had suffered from symptoms for as long as a year or more before the tumour was diagnosed.

The Tribunal considered that it was open to the Insurer and Trustee, based on the retrospective medical opinions of the neurosurgeons who treated the Complainant, to find it *likely* that the Complainant was TPD in January 2004 when he resigned from work. However, it was also not unfair or

unreasonable for the Trustee and Insurer to find from the contemporaneous evidence – i.e. from the Complainant's Employer, from his personnel records, from the absence of medical attention during 2003, from the medical report of the Complainant's General Practitioner, and from the length of time between his ceasing work and finally developing symptoms of such severity as to bring him to medical attention – that he was *not* TPD in January 2004.

The Tribunal affirmed the decision of the Insurer and Trustee.

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Very useful Quite useful Not useful Not useful at all

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