

## FOS &amp; SCT DECISIONS

# Circumstantial Silence by Trustee Deemed Misleading and Deceptive Conduct

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## Facts

The Member was 21 when he died interstate and was survived by his mother and father. He joined the Fund through his casual employment with the Employer and default cover of Death (Death Cover) plus Total and Permanent Disablement and Income Protection, collectively basic cover (Basic Cover) was applied to his account. The Member's account was set up without listing his home address.

The Member's parents sought payment of the insured death benefit originally on the basis that the Member was covered by the Policy and therefore entitled to the payment upon the happening of his death. Subsequently, they sought payment of the benefit on the basis that the Trustee had failed to discharge its legal and fiduciary duties which resulted in the insurance cover being cancelled without the Member being notified of this.

The position of the Trustee and Insurer was that in accordance with the Policy, the Member's Basic Cover (including Death Cover) ceased on 5 February 2011, 71 days after his last day of work with the Employer. As the Member's account balance was below \$1,200 at the end of the 71 day period he was not provided with Continued Cover, was no longer an Insured Member and therefore held no Death Cover.

The Trustee declined the claim and paid the balance of the account in equal shares to the mother and father as non-financial dependants, and not as dependants by virtue of interdependency.

## Issues

- Was there an insured death benefit at the date of death?
- In the absence of entitlement to a death benefit, should the Trustee have compromised the claim in the amount equivalent to the insured death benefit?
- Did an interdependency relationship arise between the Member and his parents, which would allow them to receive the death benefit?

## Determination

### *Insured death benefit?*

The Tribunal agreed with the Insurer and Trustee that at the date of death, the Member did not have Basic Cover (including Death Cover). The Tribunal held that the decisions of the Insurer and Trustee were fair and reasonable, in this regard.

### *Should the Trustee have compromised the claim?*

Although the Tribunal concluded that the Trustee and Insurer were fair and reasonable in their decision that there was no insured death benefit, it considered whether the Trustee was under an obligation to compromise the claim, as per the Trust Deed, after considering all aspects of the claim.

The Tribunal outlined a number of 'Failures' by the Trustee which it was satisfied resulted in the Member not knowing he had Basic Cover or how to maintain Continued Cover if he ceased working for the Employer. These included a failure to:

1. issue any correspondence to the Member while he was a member of the Fund including a welcome letter, PDS or member booklets;
2. upload the address of the Member to his account so that these documents could be sent to him;
3. advise the Member that he was a member of the Fund and had Basic Cover;
4. provide the Member with information about the cost of insurance and the option to elect what component of insurance he wanted;
5. advise the Member that there were insufficient monies in his account for Continued Cover to be maintained; and
6. inform the Member that his Basic Cover had ceased.

The Tribunal was not satisfied that the Member could have known, or been reasonably expected to know, that he had Basic Cover, that his Basic Cover had ceased or how to maintain Continued Cover.

Furthermore, it found that the Member would have had a reasonable expectation that this information would have been communicated to him. Ultimately, the Trustee's failure to keep him informed was to his detriment and caused him to suffer loss.

In its reasoning the Tribunal stated that the Trustee, which owed fiduciary obligations to the Member, had engaged in circumstantial silence. This is where a failure to communicate a relevant matter affecting a person constitutes conduct which is misleading or deceptive.

As a result, the Tribunal did not consider that it was fair and reasonable for the Trustee to conclude that payment of the Balance only, and not the death benefit, was fair and reasonable in the circumstances. It determined that the Trustee should have realised that its circumstantial silence denied the Member access to Death Cover which was a detriment it must rectify.

The Tribunal determined that it was fair and reasonable for the Trustee to compound the Claim. The Tribunal substituted its own decision for that of the Trustee and compromised the Claim in the sum of \$105,000, being an amount equal to the death benefit.

#### ***Potential Beneficiaries - Interdependency Relationship***

The Tribunal disagreed with the Trustee's view that as at the date of death, there was not an interdependency relationship between the Member and his parents. The Tribunal was of the view that the Trustee had not considered the totality of the circumstances in the definition of interdependency, as defined in the Trust Deed or the relevant legislation.

The Tribunal determined that the relationship between the deceased member and his parents was above that of 'a normal parent-child' due to the severity of the Member's psychiatric condition, which was the only reason he was not living at home with his parents at the time of his death, on the advice of his Doctors. Furthermore, the Tribunal was satisfied that the mother and father continued to support the Member by providing medication, personal equipment and extra health cover.

The Tribunal determined it fair and reasonable that the Claim together with the Balance be distributed equally to the father and mother as dependants by virtue of interdependency.

#### **Implications**

- Even where there is an absence of entitlement to a death benefit, if the Trust Deed gives it the power to do so, the Trustee must consider the whole of the claim and decide whether to compromise the claim.

- The obligation not to engage in misleading and deceptive conduct goes to the core of fiduciary duties owed by the Trustee to the Member. A Trustee may be found to have engaged in misleading or deceptive conduct where they have failed to communicate a relevant matter affecting a member.
- In assessing the nature of an interdependency relationship, the Trustee must look at the totality of the circumstances in the definition of interdependence as defined in the Trust Deed and relevant legislation, and not limit their assessment to one consideration.