Should trustees give reasons for decisions? The argument for

Received: 29th August, 2003

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Abstract The purpose of this paper is to argue that trustees should give reasons for their decisions to members who are affected by those decisions. Richard Evans puts the opposing argument in the accompanying paper (see pp. 124–130).

Keywords: *trustees' duties; reasons; Pensions Ombudsman*

Introduction: Reasons for not giving reasons

Traditionally, trustees have often been advised not to record or disclose their reasons for decisions. The thinking behind this is that the courts will not ask for reasons, but they will review any reasons given. If reasons are given, the courts may conclude that the reasons show, for example, that the decision was based on factors that ought not to have been considered.

The courts will not normally interfere with an exercise of trustee discretion, except in limited circumstances. The courts will also normally assume that trustees have acted properly, unless there is reason to believe otherwise. However, the courts may draw their own (possibly adverse) conclusions from the absence of reasons.

The Pensions Ombudsman has now upset this traditional approach. In a series of cases, the Ombudsman has made clear his view that trustees should give reasons for their decisions.

The Pensions Ombudsman's view: The *Allen v TKM* case

In the case of *Mr C Allen v TKM Group Pension Trust Limited*,¹ the Pensions Ombudsman considered Mr Allen's complaint that his pension scheme trustees had refused to give reasons for rejecting his claim for an unreduced early retirement pension.

Mr Allen had asked the trustees for early retirement from the TKM Group Pension Scheme, and was quoted a pension that was reduced for early payment. The booklet said that no reduction would apply for members who had completed more than 40 years' service. Mr Allen had completed more than 40 years' service, but part of this service had been with a predecessor company.

Mr Allen was told that an unreduced pension could be paid at the trustees' discretion, but the trustees had refused to exercise their discretion in his favour. Mr Allen asked to see a copy of the minutes of the meeting at which the trustees

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made their decision, but this request was refused.

The Ombudsman directed that, after reconsidering their decision, the trustees should provide Mr Allen with a copy of the material placed before them as part of that consideration and should give reasons for their decision. In doing so, the Ombudsman made the following comments:

‘As Opas advised Mr Allen, there is no legal duty on the Trustee to make copies of their minutes available to him. Thus Mr Allen cannot as a matter of law seek some order from the courts to obtain those minutes. It would be wrong however to conclude that the absence of a breach of law means there is no act of maladministration.

Maladministration is in some ways a wider concept than a breach of law and Respondents to complaints may sometimes find themselves judged to have acted with maladministration in circumstances where they would not be regarded as acting unlawfully.

As a matter of good administrative practice, trustees should provide reasons for their decisions to those with a legitimate interest in the matter and, subject to the need to preserve rights to privacy of individual members, should also make the minutes of their meeting available to scheme members. I can see no good reason for the Trustee not to have done so in this case and the failure of the Trustee to do this for Mr Allen was also maladministration. Not knowing the basis on which an adverse decision is taken is itself an injustice.’

The reasoning of the Pensions Ombudsman

The Ombudsman’s reasoning in *TKM* is open to question. It makes no sense to say that trustees have no legal duty to give reasons, and then direct them to do what they have no duty to do. It may be that ‘maladministration’ covers more than simple breach of legal duty.

However, it is hard to see that exercising a legal right (ie not to give reasons) can be maladministration.

The Ombudsman also confuses the question of whether trustees should give reasons with the question of whether they should disclose copies of their minutes to members. The two questions should be looked at separately. It does not follow from a duty to give reasons that the trustees should also disclose their minutes. Interestingly, in spite of the comments in the *TKM* case, the Ombudsman did not direct the trustees to disclose their minutes.

The Ombudsman’s decision in *TKM* can, however, be supported on legal grounds. The statement that trustees have no legal duty to give reasons is itself open to question. The statement is based on the Court of Appeal’s decision in the 1964 family trust case of *Re Londonderry’s Settlement*.² The High Court applied this decision to pension trusts in the 1994 case of *Wilson v The Law Debenture Trust Corporation*.³ However, both these cases concerned trustee decisions in relation to discretions of a very different kind to the discretion at issue in *TKM*. They were also concerned more with the disclosure of minutes than the giving of reasons.

The legal duty to give reasons: The *Asha v Millennium Commission* case

The Court of Appeal decision in *The Asha Foundation v The Millennium Commission*,⁴ contains some useful comments about the duty to give reasons. The case did not concern pensions. However, the Millennium Commission is arguably in a similar position to a trustee board when considering the granting of funds. The distribution of a fixed amount of funding ‘benefit’ between a number of potential ‘beneficiaries’ is a situation that most

pension trustees will be familiar with.

Asha applied to the Millennium Commission for a grant. There were more applicants than funds available, and Asha was unsuccessful. The Commission told Asha that the comparative merits of all applications were measured by reference to the Commission's key criteria (which were explained). Asha argued that these 'reasons' were legally inadequate, and that the duty to give reasons required the Commission to explain why it had preferred the other applications.

The High Court held that the Commission's reasons were adequate, and the Court of Appeal dismissed Asha's appeal. In the Court of Appeal, Lord Woolf, identified two 'general propositions' and made the following comments:

'First, in the case of a decision of the sort that the Commission was making, as a matter of good administration and fairness the body concerned should give such reasons as are appropriate and reasonable in the circumstances. This should be done:

- (a) because the obligation to give reasons causes a decision-making body properly to focus its mind on the task before it;
- (b) the exercise of giving reasons causes the body to consider in turn the relevant considerations.

A second reason why it is important is connected with the first reasons. When a decision as significant as this is made by the Commission for a body such as Asha, it is important that that body should have a reasonable and practicable opportunity to satisfy itself that the decision has been properly taken. If it has not been properly taken, the body should be in a position to come before the court and ask for the decision to be set aside or amended. However, that does not mean that in every case there is a duty to give detailed reasons ... it all depends on the circumstances

because the circumstances are always important ... Where reasons are required to be given, the obligation is to give appropriate reasons having regard to the circumstances of the case. ...

One of the issues that the Commission had to decide in this case was the question of eligibility. If the Commission had concluded that the application fell down because it did not meet the eligibility criteria, then in my judgment it would be necessary for the Commission to point out in their decision why the application did not comply with the eligibility criteria. However, when considering the question of whether or not to grant an application which is eligible, differing situations can exist. There may be situations where the Commission conclude: "We reject the application, although it is eligible, on a particular ground." If that is the basis for the decision, then the Commission must say what the particular ground is ...

But there are other kinds of decisions of the Commission where a realistic assessment of what is appropriate dictates a different conclusion. When the Commission is engaged in assessing the qualities of the different applications which were before them in competition with each other, the difficulties which would be involved in giving detailed reasons become clear. First, the preference for a particular application may not be the same in the case of each commissioner. Secondly, in order to evaluate any reasons that are given for preferring one application to another, the full nature and details of both applications has to be known. If the Commission were to be required to do what [Asha] submits was their obligation here, the Commission would have had to set out in detail each commissioner's views in relation to each of the applications and to provide the background material to Asha so that they could assess whether those conclusions were appropriate. This would be an undue burden upon any commission. It would make their task almost impossible. It certainly would be in my judgment impracticable as a matter of good administration.

Although I fully sympathise with the

concerns of Asha, to learn more than that one application is preferred to this particular application is all that can be required of a body such as the Commission when it makes a decision of this sort. If ground for decision [sic] of the Commission is that in their view one application is less satisfactory than the others that succeed, it does not seem to me that more can be done than was done here. That therefore in my view deals with the principal grounds of this appeal.'

These comments could all have been written about the decisions that are taken by pension scheme trustees. The recognition that different kinds of decisions may require different standards of reasons to be given ties in with the similar recognition by the Ombudsman in the *TKM* case.

Different kinds of trustee decision

In the *TKM* case, the Ombudsman recognised that different kinds of trustee decisions might require a different approach to the giving of reasons, and a different level of detail when reasons are given. For example, the Ombudsman referred in *TKM* to the need to 'preserve rights of privacy of other people'. There is also a suggestion that the requirement to give reasons may depend on whether the decision is 'adverse' to the interests of the member seeking disclosure.

It is possible to identify four different kinds of trustee decision, involving three different kinds of trustee discretion. Each kind of decision and discretion can be approached differently.

Decisions of fact

The first kind of decision concerns matters of 'fact' (eg does the person qualify for a benefit under the rules?), rather than 'discretion' (eg should a benefit be paid?). The most common

decisions of this kind concern a person's eligibility for a benefit (eg whether a person is a member's 'dependant', or whether a member is suffering from 'incapacity').

These kinds of decisions do not involve the exercise of a discretion. The *Londonderry* case does not cover decisions of this kind, and trustees have no defence to a claim that they should give reasons. If the trustees decide that an applicant is not eligible for a benefit, they should point out why the applicant 'did not comply with the eligibility criteria'.

Decisions about whether to pay a benefit

The second kind of decision concerns the exercise of discretion affecting only a single person (eg whether or not to consent to payment of an incapacity retirement pension, where this is discretionary benefit, rather than paid automatically if incapacity is proved). *Allen v TKM* was concerned with this kind of decision.

This kind of discretion is different from the discretion in *Londonderry*. It is clear from the cases that the courts will look at the kind of discretion, and the decision's impact on the applicant, when deciding whether reasons should be given. The *Londonderry* case does not cover this kind of decision, so there is no legal authority to prevent the Ombudsman from directing the trustees to give reasons. On the contrary, Lord Woolf's general propositions suggest that trustees should give reasons.

Decisions about the distribution of benefits

The third kind of decision is where the trustees have an obligation to pay a benefit, but discretion as to whom to

pay it. The distribution of lump sum death benefits is probably the only example of this kind of decision that many trustees will come across.

Londonderry concerned this kind of decision, so too did *Asha*.

So is this case covered by *Londonderry*? Arguably not. *Londonderry* was primarily about disclosure of documents containing confidential information relating to various potential beneficiaries. The court refused to order disclosure, and it seems certain that the Ombudsman would do the same. However, refusing to disclose documents is not the same as refusing to give reasons.

It is worth noting that giving reasons to a disappointed potential beneficiary in this kind of case may impact on the chosen recipient's right to privacy. This is a matter referred to by the Ombudsman in the *TKM* case. It is therefore apparent that the Ombudsman may take a different view as to the kind of reasons to be given in this kind of case, compared to the kind of decision under consideration in *TKM*.

The *Asha* case shows the kind of reasons that trustees can reasonably be expected to give in this kind of case, if asked for reasons by disappointed potential beneficiaries. It is not necessary to give detailed reasons. However, the trustees can explain their 'key criteria'. It would probably help all trustee boards to set down their 'key criteria' in writing and, in difficult cases, to give a copy to potential beneficiaries before taking their decision.

Exercise of discretion affecting scheme membership as a whole

The fourth kind of decision concerns the exercise of discretion affecting the scheme membership as a whole. Examples might be where the trustees agree to a scheme merger, or to a

proposal as to use of surplus. *Wilson v Law Debenture* concerned this kind of decision; in that case a decision about the calculation of a bulk transfer payment following the sale of business.

Like *Londonderry*, *Wilson* was also concerned with a claim for disclosure of trustee papers, rather than disclosure of reasons. As an authority on the disclosure of papers, the decision seems reasonable. However, as with *Londonderry*, *Wilson* should not be seen as an authority for the proposition that trustees do not have to give reasons for their decisions.

Decisions of this kind usually come only at the end of a lengthy process and after consideration of much advice. Disclosure of all papers is likely to be costly, and may not actually provide a clear explanation of the reasons for the decision. However, as with the *Londonderry* kind of discretion, there is no reason why trustees should not provide a brief summary of the 'key criteria' upon which their decision was based.

Conclusion

Many trustees have, in the past, refused to give reasons for their decisions. In doing so, they have relied on legal advice that they are under no duty to give reasons. However, such an approach to the matter is no longer appropriate in the modern pensions age, and in the light of current law.

Some lawyers may object that the Pensions Ombudsman has (again) gone too far, and imposed new duties on pension trustees. However, it is difficult to argue against the reasonableness of requiring pension trustees to give appropriate (ie not necessarily detailed) reasons for decisions that significantly affect the financial wellbeing of their members. Many trustees already do this as a matter of course for many of their

decisions, as part of good communication with members.

The problem with refusing to give reasons for a decision is that, if trustees have confidence in their reasons, there is no reason not to disclose them. It is easy to infer a lack of good reasons from a refusal to say what the good reasons were. If the reasons for a decision were flawed, then one would naturally prefer

not to disclose them. However, concern that reasons may be flawed is hardly a good reason for refusing to disclose them!

References

- 1 (2002) L00370.
- 2 [1965] Ch 918.
- 3 [1995] 2 All ER 337; [1995] OPLR 103.
- 4 [2003] All ER(D) 81 (Jan).