

CASES AND TRIBUNAL DECISIONS

When is a fair and reasonable decision not fair and reasonable?

Mercer Superannuation (Australia) Limited v Billinghamurst [2016] FCA 1274

[Link to decision](#)

Background

The respondent, Mr Billinghamurst, was a former Managing Director within the Grosvenor Group, and a member of their corporate plan within the Mercer Super Trust (fund). The applicant, Mercer Superannuation (Australia) Limited (trustee), was the trustee of the fund. The respondent was in receipt of a lifetime pension from the fund following his retirement.

In August 2011, the employer obtained advice from the plan actuary regarding the conversion of pensions of current pensioners to lump sum amounts. In November 2011, the employer advised the trustee that it would cease to operate as a business from 31 December 2011 and would therefore automatically cease to participate in the plan. The employer requested the trustee to prepare calculations of the 'transfer value' of the entitlements of current pensioners. The trustee engaged the same plan actuary to undertake the calculations of these lump sum amounts and ultimately adopted the actuary's recommendations, after obtaining approval from APRA.

The trustee made a lump sum payment to Mr Billinghamurst in March 2012. Mr Billinghamurst complained about the basis used to calculate the lump sum. The trustee sought further advice from the plan actuary and maintained that it had taken all necessary steps to ensure that the outcome for all members (including Mr Billinghamurst) was 'fair and reasonable'.

Mr Billinghamurst provided competing actuarial evidence.

However, the trustee affirmed its original decision, noting that it was satisfied that the basis for the calculations was 'fair and reasonable in all the circumstances and was made in accordance with the trustee's obligations at law.'

Mr Billinghamurst complained to the Superannuation Complaints Tribunal (Tribunal) in February 2013. In December 2015 the Tribunal held that it was not satisfied that the trustee's decision in relation to the calculation of the lump payable to Mr Billinghamurst was fair and reasonable in the circumstances.

In particular the Tribunal found that:

- Under s52(2)(C) of the *Superannuation Industry (Supervision) Act 1993* the trustee was required to perform its duties and exercise its powers in the best interests of the beneficiaries, including Mr Billinghamurst. However, it was apparent from the trustee's correspondence and minutes that it had applied a 'fair and reasonable' test in determining the method used to make the calculations. The trustee had therefore applied the wrong test.
- Similarly, the trustee had adopted an assumed rate of return on the basis that it was 'fair and reasonable', rather than a rate of return that was in the best interests of the beneficiaries.
- The trustee had acted under the influence of the employer when there was no allowance for it to do so under the Rules of the Fund. The trustee should

not have had regard to the employer's directions, preferences and objectives, or the extent to which the employer indicated it would be prepared to fund additional contributions to the plan. These were not factors which were fair and reasonable for the trustee to take into account.

- In breach of its fiduciary duty, the trustee had acted on advice from a plan actuary who was subject to a conflict of interest because he had also provided advice to the employer.

The matter was remitted back to the trustee for further deliberation. However the trustee appealed the decision to the Federal Court. Mr Billingham did not defend the proceeding.

Decision

The trustee's primary ground of appeal was that the Tribunal had erred by approaching its task as a form of judicial review, and focusing on whether the reasoning and decision-making process followed by the trustee was fair and reasonable, rather than whether its decision was fair and reasonable in its operation to Mr Billingham.

His Honour Justice Moshinsky referred to a number of decisions which stated that the Tribunal's role was to consider whether the actual decision, as opposed to the process by which the decision was reached, was fair and reasonable. However, his Honour noted that the circumstances which may make a trustee's decision unfair or unreasonable were many and varied, and a narrow approach should not be adopted. He confirmed that there may be circumstances in which unfairness in the process could lead to unfairness in the decision, and held that this was a case in which it was open for the Tribunal to make that conclusion.

His Honour noted that the language used by the trustee in its correspondence and minutes was not necessarily inconsistent with its obligation to act in the best interests of the beneficiaries, including Mr Billingham. However, the language of 'fair and reasonable' was the language of the review mechanism under the *Superannuation (Resolution of Complaints) Act 1993*. The trustee's use of this expression had understandably raised concerns for the Tribunal that the trustee had not addressed its task correctly. In that

respect, his Honour noted that while the Tribunal's task was to determine if the trustee's decision was fair and reasonable in the circumstances in its operation to Mr Billingham, the trustee's task was to determine an amount in accordance with the fund Rules and superannuation laws, and not merely to decide whether a figure proposed by the plan actuary was within a range of fair and reasonable outcomes. The trustee's appeal was dismissed with no order as to costs.

Implications

The case highlights the importance that trustees adequately document how they have complied with their duties, and avoid straying into the language of 'fairness and reasonableness'.