

The Trustee toolkit downloadable

The trustee's role

Tutorial four: Duties and powers

By the end of this tutorial you will better understand:

- ▶ what trustee duties are
- ▶ the trustee's powers under the scheme rules and the balance of powers between the trustees and employer for your scheme

This tutorial is part of Scenario two.

Glossary

A detailed glossary of technical terms can be downloaded from the Resources tab when you log in at www.trusteetoolkit.com

Duties and powers

Trustees have to perform a number of duties and exercise a number of powers. The distinction between duties and powers is not always easy. For the purpose of this module, 'duties' means those things which trustees must do whereas 'powers' are those things which they may do.

Duties

Trustees have duties which they are required to carry out. Some of the trustee duties arise as a result of trust law, other duties are defined in the trust deed and rules of the scheme and some exist as a result of legislation.

Powers and discretions

Trustees are given specific powers to undertake their role. These powers are defined in legislation as well as in the trust deed, and will vary from scheme to scheme.

Trustees have a responsibility to the scheme beneficiaries. They can delegate work to other parties or organisations but (subject to an exception around making certain investment decisions as described in the Tutorial 'Becoming a trustee' earlier in this module) they remain responsible to the beneficiaries for their decisions and their actions.

What do 'duties and powers' mean in practice?

Fiona Bryant works for ABC Materials and has been a member-nominated trustee (MNT) for the pension scheme for a few years. The scheme has both a DB section and a DC section. We will follow Fiona as she learns more about her duties, powers and responsibilities as a trustee.

Fiona's trust law duties

Trustee duties are wide-ranging.

Acting in accordance with the scheme's trust deed rules

The scheme's trust deed and rules set out benefits payable under the scheme and trustees' powers and responsibilities in relation to them. Trustees have a duty to administer the scheme in accordance with the scheme's trust deed and rules.

Even though trustees may delegate some of their duties, for example to a third party, the actual responsibility for collection of contributions, holding assets and payment of benefits rests with the trustees.

Acting in the best interests of all scheme beneficiaries

As a trustee, Fiona's duties are to the scheme beneficiaries as a whole. Therefore, even though she is an active member of the scheme and has been appointed as an MNT, she must consider pensioners and deferred members as well as active members.

Beneficiaries are not limited to current and former employees. They also include surviving spouses and dependants. In most cases, the employer is also a beneficiary because it may be entitled to any residual surplus on termination of the scheme. Trustees therefore have to consider the interests of the employers in a scheme.

Being impartial

Sometimes it is impossible to make a decision that will benefit all classes equally. In these circumstances, it is essential that trustees consider the (sometimes) differing interests of different classes of beneficiary, striking an appropriate balance between the interests of all.

Acting prudently

Acting prudently means acting in the way that an ordinary prudent person of business would act in managing their own affairs.

Where a trustee is acting in a professional capacity, or holds herself out as possessing a special skill, the standard of prudence expected of them will be that that an ordinary prudent person of business, possessing the trustee's special skill or expertise, would apply to the management of her own affairs.

Acting prudently means that any risks the trustees take must be based on informed decisions, carefully balancing the impact of the decision on the scheme's beneficiaries.

Acting responsibly and honestly

Acting responsibly and honestly is key as trustees are responsible for all the decisions they make long after they cease to be trustees.

Take a considered view

However much Fiona might want to, she should not just agree with what other trustees say without question. She has to talk to the experts and read all the documents herself and come to her own view about the matter, which she should outline and discuss with the other scheme trustees.

Fiona and the other trustees need to be willing to constructively challenge the advice that they are being given by their advisers, to ensure that they fully understand both the advice and its implications.

Be able to justify your decisions

It is important that Fiona and her fellow trustees can justify any decision they make, so they have to know the reasons why they made it. Trustees should make sure they record the decision and its rationale.

Take the relevant factors into account

...and disregard the irrelevant factors. If you are uncertain about what factors to take into account, speak to your advisers as that is what they are there for.

Invest in trust property

Under trust law, trustees have a duty to invest. This is covered in detail in the Introduction to investment module, but generally when investing in her capacity as trustee, Fiona must:

- ▶ act prudently
- ▶ act in the best financial interests of the scheme's beneficiaries. This means Fiona and her fellow trustees cannot invest purely on ethical or political grounds
- ▶ ensure diversification and suitability

Not make a profit out of trusteeship

As a trustee, Fiona has a duty not to make a personal profit out of her role as a trustee of the scheme at the expense of the scheme. Fiona was worried about this when she first started: she thought it meant she could never vote to increase the benefits – because she would make a profit as a member. But this is not the case. Trustees can benefit as members, although they must consider all beneficiaries impartially, and not favour their own group.

Fiona's statutory duties

These duties are set out in the Pensions Act 1995 and Pensions Act 2004.

Pensions Act 1995

The Pensions Act 1995 imposes a number of specific duties on trustees. In particular it requires Fiona and her fellow trustees to:

- ▶ appoint scheme auditors, scheme actuaries, fund managers and legal advisers
- ▶ keep any monies received in a separate scheme bank account
- ▶ in the case of a DC scheme, prepare, maintain and revise a payment schedule and report to The Pensions Regulator (TPR) and scheme members if contributions are paid late
- ▶ make and implement dispute resolution procedures
- ▶ disclose information about the scheme to members and certain other people in certain circumstances (for example, on joining the scheme and on benefits becoming payable)
- ▶ obtain and make available audited accounts and an audited statement about scheme contributions

Pensions Act 2004

The Pensions Act 2004 added to these duties. For example, Fiona and her fellow trustees must:

- ▶ prepare a schedule of contributions and statement of funding principles (DB schemes only)

- ▶ prepare actuarial valuation/reports in accordance with the scheme's statutory funding objective and if there is a deficit, put in place a recovery plan (DB schemes only)
- ▶ notify TPR of certain events (DB schemes only)
- ▶ report breaches of the law to TPR
- ▶ provide a scheme return to TPR
- ▶ ensure that the requirements for MNTs and member-nominated directors (MNDs) are implemented

Pension Schemes Act 2021

The Pension Schemes Act 2021 introduces new duties for those involved in running pension schemes. It also gives us new powers to protect pension scheme members and the Pension Protection Fund. Find out more about what TPR is doing in relation to the Pension Schemes Act at <http://www.tpr.gov.uk/en/pension-schemes-act-2021>

Fiona's powers

Now we'll focus on powers.

What powers might you have?

Trustee powers are set out in the scheme's trust deed and rules. They vary but they frequently include the following powers to:

- ▶ amend the rules of the scheme
- ▶ delegate activities
- ▶ distribute lump sum death benefits
- ▶ decide the investment strategy and invest the scheme assets
- ▶ wind up a scheme

You can learn more in the module 'Introduction to investment'.

For the remainder of this tutorial you will learn more about three key powers: amending the trust deed and scheme rules, delegate activities and distributing lump sum death benefits.

How should you exercise your powers?

Exercising your trustee powers can be difficult because the responsibility of making a decision rests with the trustees alone. You can ask an expert (such as your lawyer) for advice but it is you who must ultimately make the decision. When deciding how to use your powers, it is important that you:

- ▶ ask yourselves the correct questions
- ▶ make sure you understand the relevant law
- ▶ take into account relevant factors but disregard irrelevant factors (ask your advisers if you are not sure what is relevant and what is not)
- ▶ do not arrive at a decision which no reasonable body of trustees could have arrived at

1. The power to amend the scheme's trust deed and rules

Amendments will almost certainly be needed from time to time, as new legislation comes into force or the circumstances of the organisation change. The scheme's trust deed and rules will set out who has the power of amendment and the balance of power will vary from scheme to scheme.

You should be aware that the Pensions Act 1995 contains provisions concerning the exercise of scheme amendment powers. It essentially limits any changes to the scheme which affect members' accrued rights or entitlements unless certain conditions are met.

Check your scheme: Amending the trust deed and rules

You are legally obliged to have a working knowledge of your trust document, and you should be aware that the balance of powers between employers and trustees varies from one scheme to another. In your scheme, who has the power to amend the trust deed and rules? Take the time now to check your own document.

- ▶ The trustees on their own
- ▶ The trustees, after the employer has been consulted
- ▶ The agreement of the trustees and the employer
- ▶ The employer on their own
- ▶ The employer, after consulting with the trustees
- ▶ None of the options listed above/Don't know

2. The power to delegate

Nearly all schemes give trustees a wide power of delegation. Although the deed gives the trustees the power to delegate activities to sub-committees or advisers and service providers, the responsibility for decisions remains with the trustee board.

Liability

Generally, trustees are not liable for any default of the person to whom they delegate as long as:

- ▶ they have acted within their powers
- ▶ they believe, in good faith that the delegate is a proper and competent person to appoint
- ▶ they have as far as possible continued to exercise overall supervision

You can learn more in the module 'Introduction to investment' in the tutorial 'Investment in a pension scheme'.

There are special requirements around delegation of investment powers. It is important that the terms of any delegation are clear and properly recorded.

Sub-committees

Your board may appoint sub-committees for specific functions. For example, there may be an investment sub-committee that discusses and recommends a particular investment strategy to the full board. If there is an audit sub-committee it may make recommendations to the board in relation to such matters as the report and accounts, and internal controls.

You should know the terms of reference of sub-committees in your own scheme, and the procedures for the ratification of their recommendations by the full board. Any decisions that are made by a sub-committee remain the responsibility of the whole trustee board.

Case study: Delegation

Gavin Chamberlain is an experienced HR director. His CEO asked him to be an employer-nominated trustee (ENT) on the board of trustees. There were some problems to sort out.

- ▶ The finance director, who was also an ENT, was on extended sick leave so they resigned from the board.
- ▶ The remaining trustees were not that experienced, so Gavin joined the board to fill the vacancy.

Recently a problem arose with the pension scheme administration. The trustees left it to the administrator to sort out but there were some complaints from members.

So one of Gavin's first tasks was to look into the scheme administration problems – tactfully of course, as he didn't want to upset the other trustees.

With Gavin aboard the trustees soon sorted it out. But while the problem was being resolved, Gavin realised that the other trustees were not quite sure about their role.



Understanding the trustee's role

Have a look at these statements made by the trustees. Which one of them do you think understands the role best?

Alex: "I think the pension administrator has to be accountable to the members for their own mistakes. We're obliged to operate the scheme in accordance with the trust deed, but we do have the power to delegate some functions."

Andrea: "Obviously, it's the pension administrator's fault. I know we're responsible for the administering the scheme, but we can't be held accountable for every administrative slip-up. But, we do need to call the administrator to account - perhaps give them a warning?"

Serena: "Well, I think we could be held responsible. Of course we can delegate some of the functions, but we're still accountable for the performance of those we delegate to, so we're definitely accountable for the performance of the pension administrator."

Answers are at the back

3. The power to distribute a lump sum benefit

To avoid inheritance tax, it is common for trustees to have a power in the scheme's trust deed and rules to pay lump sum death benefits to one of a number of potential beneficiaries.

We'll now look at a case study in Fiona's scheme.

Case study: Martha's benefit

Martha, a member of Fiona's scheme, recently passed away whilst still employed. The trustees know that Martha lived with her sister June in a house they jointly owned. Martha had a six year old son called Ben and June gave up work a few years ago to look after Ben whilst Martha continued to work. The trustees are discussing how to proceed and who to pay the lump sum death benefit to.

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What does the law require Fiona and her fellow trustees to do?

Fiona and her fellow trustees need to pay the benefits to the 'right' people in the appropriate circumstances in accordance with the scheme's trust deed and rules. They also need to exercise their discretion properly, which means to:

- ▶ make all reasonable enquiries
- ▶ consider all relevant facts
- ▶ ignore irrelevant facts
- ▶ understand and apply the correct scheme rule
- ▶ act objectively at all times

Who could the lump sum be paid to?

The trustees need to look at the definition of beneficiary under the scheme's trust deed and rules. They have no discretion about whether someone is a beneficiary. Fiona checked the definition and it confirmed that both June and Ben are potential beneficiaries.

Who among the 'beneficiaries' should it be paid to?

This is the question that involves the exercise of Fiona and her fellow trustees' powers. The answer will depend on the trustees' conclusions about the member's wishes and their financial responsibilities.

Member's wishes

If the member has completed a nomination or 'expression of wish' form then this will be a good indication of the member's wishes. If there is no form or the form is out of date, a will would provide some indication of who the member wishes to make provision for on his or her death.

Member's financial responsibilities

The question of financial responsibilities is relevant to the question of who out of the beneficiaries to pay the benefit to, and how much to pay to each person.

Conclusion

In this case Martha had completed an expression of wish form which stated that the full death benefit should be payable to Ben. However, the trustees have discovered that June, who was financially dependent on Martha, will be Ben's legal guardian and so they have agreed to exercise their powers to pay some of the benefit to June.

Answers and feedback

Serena is right. Trustees do have the power to delegate some functions, but it's clearly stated that they remain responsible for the decisions of the people they've delegated to. So Alex is right about the delegation, but wrong about the ultimate responsibility.

And while Andrea's argument sounds reasonable (not being responsible for every administrative slip-up), it's important that the trustees run the scheme prudently. In this case, this means resolving any slip-ups and trying to stop them happening again.