



2022 PENSION LAWYERS ANNUAL CONFERENCE

PROBLEMS IN DECISION-MAKING BY THE BOARD

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- A pension fund is (in 99% of cases) a legal person, but it doesn't have a brain, a voice or hands;
- To act it needs a board: its “directing mind and will”;
- The PF Act sets out what arrangements ‘make the grade’ for being a valid board:
 - S7A: ≥ 4 members; $\geq 50\%$ member elected;
 - S7B: boards exempted from some/all S7A requirements;
 - S26(2): special boards (often interim).



- The Act makes the Rules determinative on matters of election, appointment, constitution (beyond S7A/S7B minimums), term, tenure, quorum, committees, delegation, etc.;
- What the Rules don't allow, a Board cannot do: the power simply doesn't exist;
- What the Rules set as minimum requirements (e.g. quorum for a meeting) must be done, for the action/decision to be a valid act or decision of the Fund;
- Board is a collective: no individual board member has the powers of the Board.



- Without a Board quorum a Fund would be unable to act;
 - Exemptions: existing/standing delegated authority to committees, administrator etc.;
 - Rules must anticipate threats to quorum, and mitigate, e.g.:
 - Power of remaining members to act to reconstitute the Board validly;
 - Power to effect certain key functions, e.g. reviewing insurance, subject to ratification.
- * IF YOUR BOARD HAS EXPERIENCED ANY LEGITIMACY CHALLENGE/GAP – HAVE YOU APPLIED THE LEARNINGS BY REVIEWING AND BOLSTERING THE RELEVANT RULES?



- Board members do not and may not represent a constituency;
- They bring the voice / experience / interests of their backgrounds to the collective, but operate as an impartial collective in the interest of the Fund;
- A minority must respect a majority decision made in terms of the Rules – that is the Fund’s decision (not the “other Board Members’ decision”);
- All Board Members must respect, not frustrate any motion;
- Actively frustrating Board function is a breach of statutory and common-law fiduciary duty;
- Actively excluding a minority e.g. not properly advertising a meeting or motion, is also a breach, and in failing to include the whole collective in the opportunity to debate that itself can render the ultimate decision void.



- Board Charter/Code of Conduct and Rules must be relevant to your Fund and members;
 - Boilerplate Rules are only good enough for Boilerplate Funds i.e. never;
 - So interrogate and adapt your Rules to anticipate and mitigate the issues that are common to your group or sector.
- * IF YOU'VE HAD CHANGES IN YOUR EMPLOYER GROUP OR SECTOR THAT MAKE YOUR ELECTION RULES INAPPROPRIATE, HAVE YOU REVISED YOUR RULES, OR ENGAGED EMPLOYERS AND MEMBERS ABOUT THEM: OR DO YOU WAIT FOR STAKEHOLDERS TO COME TO YOU?



- Boards of management are seldom “functus officio” – certainly not always. It is an area of legal debate, so please take expert advice;
- The Guarnieri case is a good example: a decision that is wrong in law, effectively is not a decision at all, so the Board is not functus, it must take the decision again and in accordance with law.



- Ratification is different: if someone without authority decides or acts, the Fund is not bound, but if the Board agrees with the decision or action, it can ratify it (in most cases);
- Since the Board must be properly constituted in order to act/decide for the Fund, a ‘broken board’ cannot act (e.g. a residue of appointed/elected people who make up less than a quorum is not actually ‘the Board’) so their acts/decisions usually need to be ratified by a reconstituted, valid Board;
- Same is true for delegates (e.g. committees, PO, administrator) in cases where they only have a recommendation power but purport to act with authority to bind the Fund;
- Ratifications should be explained and recorded in writing in the minutes.



- Board members are equal – together they make up a diverse, collective, but single voice and ‘directing mind and will’ of the Fund;
- No differential powers except to extent the Rules may grant a ‘casting vote’ or allow delegation of certain decisions or actions to committees or individuals;
- A ‘casting vote’ should not be about authority or power, but only about resolving deadlocks, but there are more sophisticated deadlock breaking mechanisms that are preferable (or deadlocks that are not ‘mission-critical’ should be tolerated).



- Mmileng case: Trustees (and administrator) must bear the objective of the Fund and its Rules in mind, not use rules as black-letter bureaucracy to frustrate members' legitimate interests;
- * WHERE YOU EXPERIENCE A PATTERN OF COMPLAINTS AGAINST AN ADMINISTRATOR, TO WHAT EXTENT DO YOU ENGAGE ADMINISTRATOR AND THEIR SOPs, FORMS etc.? DO YOU MEASURE MEMBER SATISFACTION AND IS IT FACTORED INTO YOUR ADMINISTRATION AGREEMENT AS A FINANCIAL INCENTIVE/DISINCENTIVE?

THANK YOU

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