

Heading:

Application for release of KiwiSaver investment declined because of significant financial hardship. Direction issued.

A v E [2012] FDRS Sept 2012

1. Issue

This complaint relates to a dispute between the Scheme Member, and Customer [Customer name]. In particular, the Customer sought a release of his KiwiSaver funds managed by the Scheme Member on the ground of hardship. His request was declined. The Customer disputes that decision.

2. Background

I set out the background to this complaint as follows:

- FDR has been provided with a range of documents relating to a request by the Customer for release of his KiwiSaver funds. The documents include a completed, pre-formatted application form, dated 25 July 2011. Broadly, that form indicated that the Customer's total expenditure was of \$880.00 per month, with a total income of \$800.00 per month. Investments were recorded as amounting to \$4,841, with loans of \$10,500.00

Letters from the Customer alleged a number of grounds for hardship, including:

- Being out of work
 - Ongoing medical problems
 - Outgoings including rent of \$320.00 per week
 - Debts to family members of around \$10,500.00
 - Deaths of family members
 - His partner only being able to work 30 - 34 hours per week.
- On 23 August 2011, the Scheme Member formally notified the Customer that the request to withdraw his KiwiSaver Funds was declined:

"I am writing in regards to your request to withdraw funds from your KiwiSaver account due to financial hardship.

Unfortunately I have been advised that you are not suffering financial hardship as defined by the KiwiSaver Legislation; you cannot make a hardship claim.

I have enclosed the criteria required in order to claim Significant Financial Hardship and if you feel that you meet any of the criteria outlined, you can of course make another request."

- On 25 August 2011, The Scheme Member advised the Customer by email that his KiwiSaver funds would not be released as the circumstances did not, in the Trustees view, meet the criteria for significant financial hardship.
- On 5 September 2011, following further correspondence from the Customer, the Scheme Member wrote stating, in part:

"While the Trustee appreciates the financial position you are in, the financial information provided with your application shows a tight financial position, but not, in the Trustee's view, significant financial hardship as that is laid down in the legislation."

- The Scheme Member again wrote to the Customer on 14 September 2011, advising that the KiwiSaver funds would not be released as the application did not meet the criteria set out in its policy and in the legislation. The Scheme Member included some general information regarding significant financial hardship.
- The Customer subsequently put in a written complaint about the decision not to release his KiwiSaver funds.
- On 7 February 2012, The Scheme Member wrote to The Customer stating:

"Complaint

We refer to your letter of 3 February 2012, received on 7 February 2012, and acknowledge your complaint.

We are disappointed that this situation has resulted in a complaint as we pride ourselves on our service and in focusing on our members.

Our understanding is that your complaint is, "that the Trustee unjustifiably did not approve your significant financial hardship benefit application and allow you to withdraw the maximum amount available". If our understanding is not correct, please advise us as soon as possible.

There are two aspects to the complaint. First, did The Scheme Member and the Trustee follow an appropriate process to assess the significant financial hardship application and second, was the decision of the Trustee appropriately considered and reasonable, based on the information."

- The Customer submitted a further (second) application to the Scheme Member seeking a release of his KiwiSaver funds on the basis of hardship. I note the application form is dated 27 February 2012, and was supplied together with other documents certified by a Justice of the Peace on 28 February 2012.

With respect to details of the proposed hardship, The Customer states:

"1. Lost Job. 2. Got sick with acute gout and cardiac problems. 3. No income generated. 4. No money to buy groceries and food. 5. No food to eat - no meat to buy. 6. Could not pay ambulance bill. 7. Living on borrowed money."

With respect to his family situation, The Customer advised:

"Spouse works part-time only. She is not eligible for work and income benefits as she has no permanent residency yet. I have a dependent father, to whom I have no money to send."

The documents provided included:

- A bank statement showing a balance as of 1 January 2012 of -\$5.74.
- An undated wage receipt (which I presume is from the Customer's partner), for \$382.50.

- Letter from WINZ confirming that “Temporary Additional Support” of \$161.44 would be provided initially, and then reducing to \$154.25. The payment was to be made on 28 February 2012.
- The Customer submitted a further complaint to the Scheme Member on 3 February 2012, which was copied to FDR. That complaint expressed dissatisfaction with not having the KiwiSaver funds released, and stated, in part:

“Please refer to all my earlier correspondence since August 2011. I have respectfully and credibly met and submitted all the stipulations and criteria to enable myself to withdraw my Kiwi Saver savings. All my genuine, multiple attempts to get my Kiwi Saver funds reimbursed lawfully has met with stonewalling, frivolous unsolicited forms (documents) of [Scheme Member name] mailed repeatedly in response to my requests and complaint of re-imbursal.”

- A memorandum from the Scheme Member’s Disputes Panel, dated 27 February 2012, has been provided:

“Disputes Panel memo to the Directors:

This memo sets out the findings of the Disputes Panel in respect of the formal complaint by [Customer name].

Disputes Panel

The Disputes Panel consists of three people made up of the Disputes Manager and two staff employees from a wider panel of senior staff. For this complaint the Disputes Panel was made up of:

- *[Names of panel member]*

...

Complaint

On the 7th February 2012 [Scheme member name], received a formal complaint made by the member. The complaint stemmed from the decision by the Trustee in August 2011 to decline the member’s application for a significant financial hardship benefit dated 27th July 2011. The member disagreed with the decision arguing

that based on the information the Trustee should not have declined the application.

The nature of the complaint is therefore:

- 1. Under the legislation and in the member's circumstances, the Trustee could not reasonably withhold the money, and*
- 2. The administrator ([Scheme Member name]) and the Trustee ([Scheme Member Trustee Limited]) did not follow a reasonable process in considering the significant financial hardship claim, and/or*
- 3. The decision of the Trustee was not a reasonable decision based on the evidence.*

Timeline of process

The timeline of the process is:

- 1. On the 7th February 2012 [Scheme Member name] received the formal complaint.*
- 2. The complaint was acknowledged in a letter dated and sent on 7th February 2012. The Customer was invited to provide additional information as appropriate*
- 3. The complaint was passed to the Disputes Manager, [name] on the 7th February 2012. At which time a complete review of the application was initiated.*
- 4. The Complaints Panel was established on 8th February 2012.*
- 5. A summary of the background and events was prepared and sent on 13th February 2012 [Customer name] The Customer was invited to provide comment.*
- 6. On 14th February 2012 a note was received from [Customer Name](dated 7 February) that enclosed the standard FDR form for making a complaint. This was acknowledged on 17 February 2012 and included details of how [Customer Name] could make a new application for financial hardship as*

the implication was that his financial position may have got worse.

- 7. On 22 February 2012 [Customer Name] emailed [Name] at FDR (and copied [Disputes Manager Name] ... complaining about the "hassle" he was receiving from [Trustee name].*
- 8. Between 13th February and 16th February the [Scheme member name] staff involved in the processing of the application, were interviewed and the Disputes Panel met on three occasions to discuss the progress of the investigations and the evidence.*
- 9. The investigations and review was completed on 24th February 2012. 10. On 27th February 2012 the Review Panel advised the Directors of outcome.*

Findings from the review

Details of the background were summarised in the letter to The Customer dated 13 February 2012. In addition we note:

- 1. On the 27th July 2011 The Scheme Member administration received an application for significant financial hardship from [Customer name]. As the application was not completed in full (specifically the asset & liability section) and additional documents were required ([Customer's wife's name] bank statements for proof of income and expenditure), the administrator, [name], phoned The Customer to request the information.*
- 2. On 12th August 2011 [administrator name] received the bank statements and in addition a copy of one of [Customer's wife's name]'s payslips from [Customer name].*
- 3. On 19th August 2011 [administrator name] received the completed asset and liability section of the application form from [Customer name].*
- 4. After reviewing the application and supporting documents, on the 22nd August 2011 [administrator name] drafted the memo to the*

Trustees for peer review. The memo was peer reviewed by another administrator, [Name].

5. *[administrator name] then sent the draft with the supporting documents to [Trustee name] via email at 2:33pm for final sign off, before sending to the Trustee.*
6. *On 23rd August 2011 at 8:05am [Trustee name] confirmed that the memo should be sent to the Trustee.*
7. *At 11:01am [Administrator name] emailed the Trustee the memo. The application and supporting documents were included as attachments.*
8. *The directors of the Trustee reviewed the information and advised its decision on the 23rd August 2011. The decision was a unanimous decision that the Trustee was not satisfied that [Customer name] was suffering significant financial hardship as defined under the KiwiSaver Act 2006.*
9. *[Administrator name] phoned [Customer name] to advise him of the Trustee determination at 3:00pm on 23rd August 2011.*
10. *[Administrator name] then formally advised [Customer name] by letter dated 23 August 2011 of the outcome.*
11. *Between 24 August 2011 and 14 September there was an exchange of emails and letters between the Scheme Member and the Customer. The letters from the Scheme Member advised him of his ability to make a fresh application if his circumstances changed and his ability to make a complaint.*

Outcome of the review

The conclusions and findings of the Disputes Panel are:

- The Scheme Member administrators followed the correct procedures set by the Company and completed the tasks and collation in a timely manner.*

- The information and supporting documents that was collated and summarised for the Trustee's review and decisions was correct, accurate and unbiased.*
- The concerns the Customer had regarding the Scheme Member 'Stonewalling' him were not correct. We found that all efforts were made to contact the Customer to inform him of the correct procedures and the provisions of the KiwiSaver legislation as it relates to hardship claims.*
- That the decision of the Trustee was a decision that was reasonable based on the evidence provided and the requirements of the Act.*

It is the Disputes Panel's findings that [Customer's name]'s application was handled fairly and appropriately and within all legislative requirements. We believe that the decision made by the Trustee based on the information provided was reasonable.

Additional observations

We suggest as part of the process for the assessment of significant financial hardship applications, that on receipt of an application from a member, the member is immediately sent a note explaining the legislative requirements and the process and what to expect. A standard explanation for this should be prepared."

- On 29 February 2012, The Scheme Member provided a preliminary decision to the Customer in relation to the complaint:

"Complaint - preliminary decision

As indicated in our letter dated 7 February 2012, the internal Complaints Panel has reviewed the circumstances surrounding your Complaint and reported to the Directors. This has been considered by the Directors with a view to forming a decision on the appropriate resolution.

The purpose of this letter is to set out the preliminary decision and to seek your feedback before a final decision can be made.

Your application for significant financial hardship and all the information supplied has also been referred back to the Trustee for it to review its decision. The feedback of the Trustee has also been considered by the Directors.

We note that a summary of the background to your significant financial hardship application was sent to you in a letter dated 13 February 2012 and a letter dated 17 February 2012 also invited you to make a submission based on your current and updated financial circumstances. We also note that no comments were provided on the summary and no additional information or application was provided. However, we note the email you sent to FDR (Financial Disputes Resolution Service) dated 22 February 2012 complained further about [Scheme Member name] not paying you a financial hardship benefit.

Complaint

Our understanding is that your complaint is, "that the Trustee unjustifiably did not approve your significant financial hardship benefit application and allow you to withdraw the maximum amount available". This relates to the process and the decision itself.

Financial hardship

Significant financial hardship is defined in the KiwiSaver Act 2006 (the Act). The Act sets out a range of criteria that may give rise to significant financial difficulties. Decisions on financial hardship are made by the Trustee. An explanation of these is contained with the application form of [Scheme Member name] and we refer you to this for detail. A copy was sent with the 17 February 2012 letter.

Disputes Panel's findings and other investigations and considerations

The investigations of the Disputes Panel were that

The conclusions and findings of the Disputes Panel are:

- [Scheme Member Name] administrators followed the correct procedures set by the Company and completed the tasks and collation in a timely manner.*
- The information and supporting documents that was collated and summarised for the Trustee's review and decisions was correct, accurate and unbiased.*
- The concerns [Customer name] had regarding [Scheme Member Name] 'Stonewalling' him were not correct. We found that all efforts were made to contact the Customer to inform him of the correct procedures and the provisions of the KiwiSaver legislation as it relates to hardship claims.*
- That the decision of the Trustee was a decision that was reasonable based on the evidence provided and the requirements of the Act.*

As noted above the Trustee was also asked to review and reconsider its decision. The comments of the Trustee were:

I have reviewed the report and still have the view that, on the information provided to the trustees, the Customer did not meet the criteria for a significant financial hardship withdrawal.

I think we have had not any relevant additional information since our decision and that I would make the same decision today, based on the information we have.

Certainly I am happy that we made the right decision as he wasn't overdue with his debts and he gave no proof that he had explored other financing.

Preliminary decision

In light of the above and based on its own review, the conclusion of the Directors is that the Trustee did not inappropriately withhold your money and deny you a significant financial hardship benefit. The main problem is that the evidence did not support the application and meet the required standard as contemplated by the Act.

The preliminary decision of the Directors is therefore not to agree with your Complaint.

However, the role of the Directors is to look to obtain a satisfactory resolution to your Complaint. In light of the decision of the Trustee we cannot pay out a significant financial hardship benefit. The legislation does not allow us to. We note that the Trustee can only make a decision based on the evidence that you actually provide. We also note that the implication of several of the comments you have made in various comments to FDR and ISO is that your financial position has got worse since your original application. If this is the case then you may wish to provide updated evidence.

It would seem to us that the best way to resolve your Complaint is for you to provide updated information and evidence. Without that there is nothing that we can do under the legislation. We strongly encourage you to provide additional evidence if you believe that you are suffering from significant financial hardship as per the KiwiSaver Act 2006. You can provide such information at any time."

- On 29 February 2012, the Customer made a further complaint to the Scheme Member. That complaint related to the decision made by the Scheme Member to decline the application to release his KiwiSaver funds. Again the Customer sought a release of those funds on the basis of the submitted hardship.
- On 5 March 2012, The Scheme Member again invited the customer to provide further information, such as bank statements and information regarding outgoings and debts.
- The Scheme Member issued a "final decision" on 20 March 2012, stating:

"Complaint - Final Decision

I refer to our letter of 29 February 2012. That letter summarised the findings of our internal complaints process and outlined the Directors' preliminary decision and sort feedback.

...

Formal decision

The formal decision in respect of the Complaint is not to uphold it. The Directors therefore have determined that no action is required in respect of your Complaint and that the Trustee did not inappropriately withhold your money and deny you a significant financial hardship.

External complaints resolution process - Financial Dispute Resolution (FDR) service

As you are aware [Scheme Member name] is a member of FDR. Therefore if you are unhappy with the resolution of your Complaint you can advise us and under our complaints procedure we will issue a "Deadlock" notice. This is required before you can take a complaint to FDR. We note that the issuing of a Deadlock notice does not automatically mean that FDR can consider your Complaint. That is a decision that they will need to make should you make an application. However note that to go to FDR you need a Deadlock notice and this will only be issued if you formally advise us that our formal decision does not resolve matters to your satisfaction."

3. Position of the Parties

Customer's position

FDR has received a number of communications from [Customer name]. Those include:

- A range of information including bank and credit card statements, a disability certificate, and a letter from the Customer's brother regarding a loan of \$7,000.00.
- A loan document from the National Bank, in relation to a personal loan taken out by [name], whom [Customer Name] states is his spouse. The loan agreement was dated 13 March 2012, and for the sum of \$8,500.00.

FDR's understanding of the Customer's complaint is, simply put, that the Scheme Member was wrong in declining to release his KiwiSaver funds. The Customer is of the view that he does meet the significant hardship criteria, so as to justify the funds being released.

Scheme Member's position

FDR wrote to the Scheme Member on 5 July 2012, confirming that it considered there was jurisdiction to consider this complaint within the Scheme Rules (this is discussed further below). On 19 July 2012, the Scheme Member was requested to provide a formal response to the complaint.

The Scheme Member provided a formal response dated 24 July 2012:

"Assuming that the details of the complaint given in the 'dispute details' above are correct, the complaint is that the trustee incorrectly declined the application. On the basis of the evidence, the Trustee concluded that it was not satisfied that [Customer name] met the legislative requirements for a significant financial hardship withdrawal. By way of a separate letter we set out the history of this application and the evidence provided by [Customer name].

[Customer name] complained about the decision of the Trustee so the decision and the process were put through [Scheme Member name] internal disputes resolution/complaints process. [Customer name] was invited to provide additional information but chose not to. The conclusions of that process were that the Trustee had followed an appropriate process and reached a reasonable decision in the circumstances. Advice of that preliminary outcome was sent to the Customer on 29 February 2012. [Customer name] declined to provide additional information or comment on the decision. Advice of the formal outcome was sent to [Customer name] on 20 March 2012. [Customer name] has provided no comment on the formal outcome.

It was also suggested to [Customer name] that he make a fresh application and include complete and updated financial information. If [Customer name] is suffering

significant financial hardship as defined by the Act, then this was the best way to address his concerns. We also offered to meet with [Customer name] to help him complete the forms and gather the information. [Customer name] has yet to provide complete information and has not accepted the offer to help.

We note that the complaint to the FDR scheme referred to 'applications' (our emphasis). We note that the second application (dated 27 February 2012 and received on 1 March 2012) cannot be considered to be part of the complaint to the FDR scheme as it has not been subject to a complaint to [Scheme Member name] or subject to the [Scheme Member name] complaints procedures. The majority of the supporting information provided by [Customer name] to the FDR scheme relates to his second application."

The Scheme Member also provided a formal letter dated 24 July 2012, stating:

"We refer to your email of 19 July 2012 and advise:

- 1. We do not believe that this is a complaint that is under the jurisdiction of the FDR scheme. We think that you have made an error of judgement in accepting the complaint. We will be addressing this in due course.*
- 2. We also think that it falls upon the FDR scheme to ensure that the nature of the complaint is clear so that each party understands exactly what this is. It is very hard to make comments and respond to the specifics of [Customer name]'s complaint.*
- 3. Notwithstanding our views on the validity of the jurisdiction over the complaint and our lack of understanding as to what is the true nature of the complaint, we have responded to your request by way of this letter, and the completion of your response form.*

What is the complaint?

4. *We are struggling to understand what the complaint is. This is in part because the information under the "Dispute details" on the response form was poorly worded. We assume that the complaint is:*

'that [Scheme Member name] Trustee Limited (the trustee of the [Scheme Member name] KiwiSaver scheme) did not approve the applications for significant financial hardship of [Customer name] when it should have and, had it approved the application, [Customer name] would have been paid part of his balance.'

5. *If this is the complaint, then the suggestion is that the Trustee did not exercise its judgement correctly and so reached the wrong decision. We do not think that the FDR scheme can look at this aspect of the operation of a KiwiSaver scheme.*

6. *To accept a complaint, the complaint has to meet the test "how a policy or practice has been applied or administered in a particular case". The complaint cannot be about whether the member (The Customer in this case) disagreed with the decision of the Trustee.*

7. *It is possible that the complaint is that the Trustee did not follow its process correctly or that the process was followed correctly, but was unreasonable. If this is the case, then the complaint "may" fall under the FDR scheme but this is not obvious because significant financial hardship is a legislative issue and not a trustee policy issue. However, all of the information that you have received from [Customer Name] shows that these could not be the case as evidence of the process demonstrates a very thorough consideration.*

8. *The Customer seeks as resolution the return of his available funds. This implies that the complaint is that the Trustee made the wrong decision either because its decision was wrong, or the process was flawed so that it did not consider the evidence, and had it, considered it, the Trustee would have made a different decision. However, even if this was true, the only decision that could now be*

made is that the Trustee must revisit its consideration of the application.

The amount involved is \$3,101.49

9. ...

10. *The amount that is therefore potentially available is limited to \$3,101.49. Also, if the Trustee had concluded that the test for significant financial hardship had been met, the amount available is also limited to the amount that would alleviate the significant financial hardship. This is not the amount of the debts but the amount to solve the financial difficulties, for example in meeting [Customer name]'s living expenses.*

The Trustee has spent considerable time considering the original application and in communicating with [Customer name].

11. *In a letter dated 7 February 2012, [Scheme Member name] wrote to [Customer name] acknowledging his formal complaint. It had received the complaint that day and it had been dated 3 February 2012. A copy of this letter is attached. This letter summarised the process that we would follow and invited comments. No comments were received.*

12. *In a letter dated 13 February 2012, [Scheme Member name] summarised the events since the date of the original application and correspondence regarding the complaint and application, and sent it to [Customer name] for his review and comments. No comments were received.*

13. *The 13 February letter including a summary dated 13 February included a chronological order of events up to 7 February 2012.*

14. *Since 13 February 2012, there have been three main events:*

- *[Scheme Member name] put the complaint through its internal complaints process*

- *[Customer name] made a further significant financial hardship application.*
- *[Customer name] made a complaint to FDR.*

15. *We do not think that [Customer name] is entitled to make a complaint to the FDR scheme. Also the complaint, if valid, can only be in respect of the original application as no complaint has been received by [Scheme Member name] in respect of the second application and in fact we are still waiting for the full details for that application before it can be formally considered. Based on the incomplete evidence provided to date, the conclusion of the Trustee was that it remained of the view that [Customer name] did not meet the legislative criteria.*

Internal complaint process outcome

16. *The internal Disputes Panel investigated the complaint between the time of the complaint and 27 February 2012. Its findings were summarised in a memorandum dated 27 February 2012. A copy of this is attached.*

17. *As part of the process the Trustee was also asked to revisit its decision in light of the complaint. The Trustee did so and confirmed its original decision.*

18. *The directors of [Scheme Member name] (the scheme's manager) considered the Disputes Panel's findings and made their preliminary and ultimately formal decisions. These were communicated to [Customer Name].*

...

24. *In terms of the second application, this information provided remains incomplete and despite requests and offers to assist [Customer name] collate the information, it remains outstanding and the offer of assistance was not taken up. It is not possible to consider an application without the full details.*

25. *It is also not possible to consider a complaint in respect of the second application as no complaint has been received by either [Scheme Member name] or [Scheme Member Name] Trustee Limited.*

Legislation

26. *It is important to recognise that significant hardship is defined in the KiwiSaver Act 2006. We have not reproduced the Act's provisions and assume that you have a copy.*

27. *There are many aspects to the Act's provisions, but key factors include:*

- financial difficulties must arise or are likely to arise due, among other factors, to the inability to meet minimum living expenses; and –*
- the Trustee must be reasonably satisfied that reasonable alternative sources of funding have been explored and have been exhausted.*

(Our emphasis)

28. *The Trustee does not set the legislation but is required to apply it. The Trustee notes:*

- on the basis of the evidence that the Trustee was not satisfied that the member was suffering significant financial hardship; and*
- the alternative funding options had not been exhausted.*

29. *In fact in respect of the application, [Customer name] stated that he intended to use the money to help buy a car in case he needed one when he ultimately found a job. The Trustee did not consider that this was consistent with the minimum living standards test. It was a purpose that would only have been relevant once a job had been found. We also note that there was no material evidence of outstanding bills or the ability not to meet minimum living standards.*

30. *We also note that since the application, The Customer and his wife were able to meet the National Bank's requirements for a \$8,500*

personal loan. We are not aware of the Bank's security and due diligence requirements in this regard but would expect that it concluded sufficient surplus family income above minimum living expenses to be able to repay the loan. However, it is evident that alternative funding was available.

31. *As a final observation, we note that the directors of [Scheme Member name] Trustee Limited, the scheme's trustee, consider all applications for withdrawals associated with significant financial hardship and that pass an initial screening. The directors see all the background information and take very seriously the Trustee's responsibilities under the KiwiSaver Act 2006. The directors saw all the information in connection with [Customer name]'s application and reached their decision based on the available material. The directors have authorised the writer to send this letter on the Trustee's behalf."*

4. Relevant Statutory Provisions

The relevant legislation is the KiwiSaver Act 2006 [KiwiSaver Act]. That Act provides the basis for the operation of the KiwiSaver scheme, and provides the framework for both the collection and release of funds.

Section 113 of the KiwiSaver Act provides an ability to have initial contributions released on the basis of hardship. That provision states:

113. Refund of initial contributions

- (1) A person may apply to the Commissioner for a refund of any contributions that are being held in the holding account under section 75 if the person is suffering, or likely to suffer, significant financial hardship or is suffering serious illness.

(2) In this section, significant financial hardship has the same meaning as in clause 11 of the KiwiSaver rules and serious illness has the same meaning as in clause 12 of those rules.

(3) The application may be made by any means that the Commissioner accepts.

(4) The application must tell the Commissioner—

- (a) the person's name and address; and
- (b) the person's tax file number; and
- (c) details of the significant financial hardship or serious illness; and
- (d) any other information that the Commissioner requires.

[(5) The Commissioner must refund the contributions to which the application relates, if the Commissioner is reasonably satisfied that—

- (a) the person and the application meet the requirements of this section; and
- (b) reasonable alternative sources of funding have been explored and have been exhausted.]

[(6) However, the Commissioner—

- (a) must not refund under this section any employer contributions that were made under section 93; and
- (b) may direct that, despite subsection (5), the amount to be refunded under this section is limited to a specified amount that, in the Commissioner's opinion, is required to alleviate the particular hardship.]

(7) The Commissioner must give notice of the refund to the provider of the relevant KiwiSaver scheme (if any).

Schedule 1 of the KiwiSaver Act provides rules relating to the operation of the scheme. Clause 10 provides the following rules for release of funds due to hardship:

10. Withdrawal in cases of significant financial hardship

(1) is likely to suffer from significant financial hardship, the member may, on application to the trustees in accordance with clause 13, make a

If the trustees are

significant financial hardship withdrawal in accordance with this clause.

(2) The amount of that subject to the trustees' approval under subclause (3), be up to the value of the member's accumulation less the amount of the Crown contribution (disregarding any positive or negative returns for the purpose of calculating the amount of the Crown contribution) on the date of withdrawal.

(3) The trustees

(a) must be reasonably satisfied that all other sources of funding have been explored and have been exhausted; and

(b) may direct that the amount specified amount that, in the trustees' opinion, is required to alleviate the particular hardship.

Clause 11 of Schedule 1 provides a definition of 'financial hardship', as follows:

11. Meaning of significant financial hardship

(1) For the purposes of these rules, financial hardship includes significant financial difficulties that arise because of—

(a) a member's inability to pay a liability;

(b) a member's inability to pay a liability on her principal family residence resulting in the mortgagee seeking to enforce the mortgage on the residence; or

(c) the cost of modifying a residence arising from a disability of a member or a member's dependant; or

(d) the cost of medical treatment for a member or a member's dependant; or

(e) the cost of palliative care for a member or a member's dependant; or

(f) the cost of a funeral for a member or a member's dependant; or

(g) the member suffering from a serious illness.

(2) In this section, serious illness means a serious illness as defined in clause 12(3).

5. Jurisdiction

The Scheme Member has challenged the jurisdiction of FDR to consider this complaint.

When FDR considers any complaint, it is done so within the parameters of the Financial Service Providers (Dispute Resolution—Reserve Scheme) Rules 2010. Ordinarily FDR cannot consider a complaint where it relates to a judgment made by a Scheme Member in operating a scheme. In particular rule 10 provides:

10. Complaint must not relate to member's general policies and practices or commercial judgements or investment performance

(1) A complaint is not covered by the reserve scheme if a scheme adjudicator determines that—

(a) it relates to a member's general policies and practices unless—

(i) it is about how a policy or practice has been applied or administered in a particular case; or

(ii) it concerns a particular fee or charge made by the member (and, in this case, regard must be had to any scale of fees or charges generally applied by the member); or

(b) it is about a member's assessment of risk, of financial or commercial criteria, or of character, in deciding—

(i) whether to provide a financial service; or

(ii) the terms on which it provides a financial service; or

(c) it is about the investment performance of a financial product.

(2) However, the complaint is not excluded by subclause (1) if a scheme adjudicator determines that it may involve a breach of a legal obligation.

[Adjudicators emphasis]

Accordingly, while ordinarily FDR will not consider complaints which relate to the operational decision making of a Scheme Member, FDR must, according to the Rules, consider complaints which are centred on how a Scheme Member applies a policy in a particular case, and also where a breach of a legal obligation is alleged.

It was submitted by the Scheme Member that the dispute from the Customer was to the effect that he 'wanted his KiwiSaver' funds - and not a complaint as to the process applied by the Scheme Member.

FDR is, like all similar providers of financial dispute resolution services, a scheme intended to be used by a wide range of customers, and is not one which has ever been intended as a scheme where a customer would require the use of legal assistance to bring a complaint. FDR does not require a complaint to be framed in a technical or legalistic way.

In this case, I am entirely satisfied that the Customer's complaint is squarely a dispute as to the decision by the Scheme Member not to release his KiwiSaver funds. The result must be that to consider the complaint, FDR must consider the process and decision-making that underpinned the decision. I am satisfied this complaint does fall within the jurisdiction of FDR to consider.

6. Proposed Decision

I have set out the background to this complaint above, as well as the relevant statutory provisions.

At its most basic, the Customer has KiwiSaver funds held and managed by the Scheme Member, which he considers should be released on the grounds of hardship.

Hardship is defined in Clause 11 of Schedule 1 of the KiwiSaver Act as including "a member's inability to meet minimum living expenses". I take the claim made by the Customer to be that his financial situation is such that without the release of the funds, he could not meet his minimum living expenses.

Ultimately, The Scheme Member has determined that the circumstances in the Customer's case did not meet the grounds of hardship so as to require release of the funds. That is a discretionary decision made by the Scheme Member.

While the decision is a discretionary one, that is not to say it cannot be challenged. In Administrative Law, when considering a review of a discretionary decision, it must be determined whether the decision was¹:

1. Exercised on a wrong principle, or the decision maker has ignored or misapplied a principle laid down in the statute, or
2. Made on the basis of incorrect considerations, or
3. Was plainly wrong.

When I consider the evidence available in this case, I am not satisfied there is sufficient evidence to establish that the Scheme Member properly made the hardship decision on the necessary statutory grounds.

In order to meet the hardship definition in clause 10, the Customer must be assessed as actually suffering, or likely to suffer 'significant financial hardship'. In my view that does not require the Customer's circumstances, at that immediate time, to meet the criteria of hardship, but it will suffice if in the very near future they meet that definition. It is unclear to me whether the Trustee only considered the Customer's application on the basis of whether he was 'actually' suffering hardship, or whether it also considered whether the Customer was 'likely' to suffer hardship at some near time.

Furthermore, subclause 3 requires that the Trustees:

"...be reasonably satisfied that reasonable alternative sources of funding have been explored and have been exhausted"

¹ See for example the judgments of Wellington C.C. v Woolworths (NZ) Ltd (No.2) [1996] 2 NZLR 385, M & J Whetherill Co Ltd v Taxation Review Authority (2002) NZTC 17, 681, 17,684.

I have not received any direct information from the Trustees setting out reasons for their decision that the Customer's circumstances failed to meet this criterion. On the face of the information provided, it would seem that The Customer's case for hardship, is at the very least, arguable. I note the following factors for example:

- The Customer's alleged monthly outgoings are in excess of his earnings (\$800 earnings per month earnings, compared with \$880 outgoings).
- While the Customer states he has investments of some \$4,841, that amount is offset with liabilities of around \$10,500 with respect to loans from family members.
- The Customer has stated to the Scheme Member that his financial situation is such that he has difficulty in purchasing items of necessity, such as food.
- The fact of receiving 'temporary' support from WINZ, is on the face of it, supportive of the Customer having a degree of financial hardship.
- The Customer's partner has needed to take a bank loan. It is unclear what that loan was required for. However, if it were to cover day to day living expenses, then in my view, that would be strong support in making out a claim for hardship.

While the decision whether to release funds does, I accept, sit properly with the Trustee, it is not sufficient merely to state the outcome of a decision with respect to an application for release of funds. I find the Trustee should provide adequate reasoning for that decision, such that the Customer is able to understand the rationale. Of course, documenting reasons will also meet the needs of any subsequent reviewer of that decision, such as FDR in this case.

Finding as I do that it has not been established that the Scheme Member has taken into consideration the necessary statutory criteria when considering the Customer's application, my preliminary decision is that this matter must be returned to the Scheme Member for further consideration. That would require the Trustee to consider the Customer's application afresh, and issue a new decision with respect to release of his KiwiSaver funds. That would be a direction pursuant to

rule 26(b)(i) of the Financial Service Providers (Dispute Resolution—Reserve Scheme) Rules 2010.

Adjudicator's observation

I make the observation to the Scheme Member, that the statement in its decision letter with respect to a right to complaint to FDR, is incorrect. That statement was as follows:

“External complaints resolution process - Financial Dispute Resolution (FDR) service

As you are aware The Scheme Member is a member of FDR. Therefore if you are unhappy with the resolution of your Complaint you can advise us and under our complaints procedure we will issue a “Deadlock” notice. This is required before you can take a complaint to FDR. We note that the issuing of a Deadlock notice does not automatically mean that FDR can consider your Complaint. That is a decision that they will need to make should you make an application. However note that to go to FDR you need a Deadlock notice and this will only be issued if you formally advise us that our formal decision does not resolve matters to your satisfaction.”

The provisions within the Financial Service Providers (Dispute Resolution—Reserve Scheme) Rules 2010 which relate to access to the Reserve Scheme (FDR), hold at rule 8:

“8. Complaint must be made to member first (and referred to reserve scheme within time limit)

unless—
(1) A complaint is not covered by the reserve scheme

(a) the complainant has first made that complaint (or substantially the same complaint) to the member concerned; and

(b) 1 of the following things has occurred:

(i) the member has given the complainant written notice of its decision (a decision notice); or

(ii) the member has given the complainant written notice that it has reached the view that the parties are unlikely to resolve the complaint under the member's complaints procedures (a deadlock notice); or

(iii) at least 3 months has passed after the complainant first made that complaint to the member; and"

On the basis of the above criteria, a Customer has an automatic right to complain to the FDR about a decision from the Scheme Member, once a decision notice has been provided. To be clear, once a decision notice has been provided, the Customer does not need to advise the Scheme Member of the dispute and request a deadlock notice.

I would recommend that the Scheme Member amends its decision notice to that extent.

7. Proposed Outcome

Given my above findings, the proposed outcome is that matter be returned to the Scheme Member for further consideration. That would require the Trustee to reconsider the Customer's application afresh, and issue a new decision to the Customer with respect to release of his KiwiSaver funds. That would be a direction pursuant to rule 26(b)(i) of the Financial Service Providers (Dispute Resolution—Reserve Scheme) Rules 2010.

8. Final Decision

The Customer has advised FDR that he accepts the proposed decision.

However, the Scheme Member has advised that it does not accept the proposed decision, and provided comments from [Name], Chair of [Scheme Member name] Trustees Ltd. I have carefully considered that reply.

I accept that the complaint documents do have an inconsistency as to whether the complaint was in relation to the Scheme Member, or the [Scheme member name] Trustee Ltd. If I were to take a technical approach, I would say the complaint was against the Scheme Member, given the decision to decline the release of funds was notified by that Company. Furthermore, the formal response to FDR for the complaint was made by the Scheme Member. If the Scheme Member considered the complaint should sit with another Scheme Member (the [Scheme Member Name] Trustee Ltd), an objection could have been raised at that time.

The decision that the Scheme Member relied on in declining to release the funds, was from [Scheme member name] Trustee Ltd. In my view, for practical purposes the distinction is academic. Irrespective of which Scheme Member Company made the decision that is the subject of the complaint, the outcome would be no different. The basis for the decision to decline release of the funds has not been adequately explained to the Customer or to FDR.

As was noted in the proposed decision, FDR cannot consider complaints relating to judgements made by a Scheme Member, but can consider the process underpinning that decision. Without a proper explanation of how the decision was reached, it cannot be established that the process applied by the Scheme Member resulted in, to use [Chair of [Scheme Member name] Trustees Ltd] words, a 'reasonable decision'.

Proper reasoning for the Scheme Member's decision would require an explanation as to why the hardship criteria were found not to apply in that Customer's case. That would require reference to the facts of the claim, as well as the statutory and legal considerations made by the Scheme Member in reaching that view.

I do accept that the Scheme Member has been supportive of the Customer providing as much information as possible to support his claim.

I accept that the more information he is able to provide to support his application, the more likely any outcome would favour him.

While I remain of the view that this matter should be returned to the Scheme Member, a practical and sensible approach would be for the Scheme Member to communicate with the Customer as to what information it would like to him to provide, before any further decision is reached. FDR has no power to direct that a Customer take any specific action. However, I would strongly encourage the Customer to work with the the Scheme Member to determine what information it needs, and for him to then provide that information.

9. Final Outcome

The final outcome from this complaint is as expressed in the proposed decision. The Customer's application for release of his KiwiSaver funds must be considered afresh, and a new decision issued in due course providing reasons as to the ultimate decision. That is a direction pursuant to rule 26(b)(i) of the Financial Service Providers (Dispute Resolution—Reserve Scheme) Rules 2010.

Mr R Woodhouse
FDR Scheme Adjudicator

September 2012