

Pensions litigation briefing

December 2021

Sackers' pensions litigation team reviews recent case law and developments, examining the practical lessons for trustees and employers



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Abbreviations

AE: Automatic enrolment
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
ESG: Environmental, social and corporate governance
GMP: Guaranteed Minimum Pension
IDRP: Internal dispute resolution procedure
LTA: Lifetime allowance
PASA: Pensions Administration Standards Association
PSA21: Pension Schemes Act 2021
PCLS: Pension commencement lump sum
PSIG: Pension Scams Industry Group
SIPP: Self invested personal pension
SSAS: Small self-administered scheme
TPO: The Pensions Ombudsman
TPR: The Pensions Regulator

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Overview

“Although we are starting to return to a “new normal”, changes in the pensions world continue apace: it has been a year of big developments, with several more still to come down the line...

In this festive briefing, we kick off with a focus on the Pensions Ombudsman. On page 3, we review this year’s Annual Report, noting the areas that give rise to the most frequent complaints it receives, and looking to where complaints are likely to arise from in the coming years.

Building on the types of complaint that TPO most frequently has to deal with, on page 4, we cover three recent TPO determinations on the common topics of overpayments, misstatement, and inadequate provision of information. We can offer training looking at the approach trustees should take when making decisions and handling tricky complaints, with case studies highlighting the practical steps trustees can take.

Finally, on page 5, we examine TPO’s new guidance on communications, setting out top tips for trustees and pensions managers in this area.

Turning to new legislative changes, on pages 6 and 7 we look at what’s come in over the last few months, and what is in store, which may impact the pensions litigation sphere – with a particular focus on the hot topics of climate change and transfers.

And as the year draws to an end, we take this opportunity to wish you and your families an especially peaceful festive season, and all the best for 2022.”



Arshad Khan
Senior Counsel, pensions litigation
arshad.khan@sackers.com

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Focus on TPO: annual report

TPO's [Annual Report and Accounts](#), covering its activities and finances for the past year, shows that the demand for its service continues to be high. In the year to 31 March 2021, it handled 11,524 general enquiries by telephone, letter and email.

What do the complaints relate to?



Outcome of complaints



Source: [The Pensions Ombudsman: Annual Report and Accounts 2020/2021](#)

Following the move in recent years to resolving cases at an earlier stage using its “early resolution team”, TPO notes a decrease in the number of adjudications, and a significant increase in “early closures” (those cases closed within three months). So it seems TPO is fully embracing the role of the early resolution team in helping to resolve complaints and we believe schemes should also see this as a positive development. And, as we pick up on page 5, TPO has just published information giving schemes tips and pointers towards avoiding complaints being brought in the first place.

In total, it took on over 5,567 new cases last year, resolving 1,442 through the early resolution team. It continues its focus on resolving complaints informally (without a Determination), with these forming around 95% of all completed investigations in 2020/21. 41% of cases formally decided were upheld at least in part, compared to the previous year's 29%.

29% of investigations were open for more than 12 months – a significant increase, due to “the impact of COVID-19 and the increasing complexity of pension complaints”.

The year ahead

TPO's [Corporate Plan 2021–24](#) outlined its strategic direction for the next three years and priorities for the current year. It noted that “demand is likely to increase further as the full impact of the COVID-19 pandemic on the economy and people's changing financial circumstances evolves”. In particular, TPO expects:

- complaints relating to the furlough scheme, and its ending
- “a much larger scale” of maladministration complaints relating to the non-payment of AE contributions
- increased complaints as new regulations under the PSA21 come into force, giving trustees power to block transfers where a scam is suspected (see page 7).

TPO also notes that the introduction of the pensions dashboard will raise people's awareness of pensions which may increase demand on its services.

Focus on TPO: recent determinations

Scheme not entitled to recover overpayment of widow's pension or offset GMP

TPO has upheld a **complaint** brought by a late member's spouse who challenged a scheme's decision to recover an overpayment of her widow's pension. Mrs S's pension came into payment after her husband's death in late 1999. She began cohabiting in January 2004, but did not inform the scheme of her change in circumstances until October 2016. Rules in force at the time provided that a widow's pension would cease if the recipient remarried or started to cohabit. The scheme stopped paying her in 2016 and sought to recover the overpayment, of over £70,000. However, it offset arrears of widow's GMP that it had discovered were payable, reducing the overpayment to approximately £55,000. Mrs S complained that the scheme should not be allowed to recover the overpayment, and that offsetting the GMP payments against the overpayment was not permitted.

TPO found in this case that Mrs S had satisfied the defence of change of position, having spent the money on everyday living costs, and not having sufficient savings to repay any money. TPO was satisfied that she had acted in good faith, without knowledge that her pension would cease if she cohabited. Therefore the scheme was not entitled to recover the overpayment. In addition, offsetting her GMP against the overpayment breached legislation and constituted maladministration. The scheme was ordered to reimburse the GMP arrears, and to pay £500 in respect of distress and inconvenience.

” **Sackers comment:** Schemes may wish to weigh up the pros and cons of requiring an annual confirmation from a beneficiary that they have not remarried or cohabited (the scheme in question has now moved to requiring one), helping to avoid such issues in the future.

Overstatement of lump sum did not lead to financial loss

TPO has partly upheld a **complaint** brought by a member who claimed that they had suffered financial loss having relied on an incorrect benefit statement. In 2015, Mrs R received an annual benefit statement which quoted an incorrectly high lump sum (of over £60,000). In 2018, she bought a property overseas and took out a £30,000 loan to furnish it. She eventually discovered, via an updated quote in 2019, that her lump sum was actually going to be just over £30,000. She argued that she would not have purchased the property and taken the loan had she been aware of the correct lump sum in 2015.

TPO held that while the benefit statement in 2015 was incorrect, it was not a guarantee. In addition, Mrs R had not suffered actual financial loss, but rather a loss of expectation. She could not claim reliance on the incorrect benefit statement as she had purchased the property and taken out the loan over a year before her benefits became payable without further updated information from the scheme. On the balance of probabilities, Mrs R would not have acted differently if she had been made aware of her correct entitlement in 2015, nor had she mitigated her loss in any way, and she retained the benefit of the value of the property. However, the provision of the incorrect statements amounted to serious maladministration and TPO ordered the administrator to pay £2,000 for distress and inconvenience.

” **Sackers comment:** The high award in recognition of the distress and inconvenience caused by the maladministration in this case reflects the severity of the mistake – and that it went uncorrected for several years.

Scheme failed to provide adequate tax information

TPO has upheld a **complaint** against NHS Business Services Authority (“NHS BSA”) and Primary Care Support England (“PCSE”) in relation to an LTA charge that arose on a member's PCLS. Dr N complained that a tax charge (of nearly £4,000) which applied to his PCLS could have been avoided, or significantly reduced, if NHS BSA and PCSE had acted on his requests to update his information prior to his retirement, and given him complete and accurate information when taking his retirement benefits. Dr N held enhanced protection. When he returned his retirement option forms, he requested that a mistake in his pensionable pay figure be updated, on a number of occasions, so that his tax position was not affected. This was not done properly at the time of his retirement, and only corrected after payment of his benefits. By then it was too late and the PCLS and annual pension were adjusted upwards to reflect his correct final pensionable salary. The top-up of his PCLS was an unauthorised lump sum payment and he became liable to tax at 40% of the top-up.

TPO held that both respondents were negligent. PCSE was aware of Dr N's tax protections, concerns and queries, and it was within reasonable contemplation that a delay could affect his position. And, despite being aware of the fact Dr N was clearly relying on them, NHS BSA had given him an inaccurate picture, breaching its duty of care. TPO found against the two entities on a joint basis, ordering them to split the tax charge and to pay £250 each in respect of distress and inconvenience.

” **Sackers comment:** A scheme has no legal duty to advise members as to their tax position; this is the responsibility of the individual. However, schemes must ensure the information they do give is accurate and complete.

Focus on TPO: communications guidance

In October, TPO published [guidance](#) outlining its views on best practice for communicating with members. It covers feedback on enquiries and complaints it has received.

The guidance also directs readers to a new section on TPO's website, "[How to avoid the Ombudsman](#)". This contains key guidance, case studies on common themes in member complaints and links to key determinations. We anticipate members will be directed to these new pages and utilise the examples given to support their own complaints. It will therefore be useful for schemes to familiarise themselves with this section of TPO's website. Think of it as a bit of light festive reading over the holiday period!

As TPO itself notes, "pensions are complicated, and people find them hard to understand". Many complaints it sees stem from poor communication and failings in customer service – and over a third of complaints dealt with by its early resolution service were closed simply "by providing a robust explanation to the customer".

Top tips to avoid ending up in front of TPO



TPO sets out some useful tips which schemes would do well to check their own complaints process against.

- ✓ Take care when communicating: ensure information is clear and unambiguous
- ✓ Communicate scheme changes clearly to customers, give members a single channel of communication and make sure administrators/managers of the scheme are aware of what's been sent to members
- ✓ Ensure members have access to up-to-date scheme information that is accurate, clear, and concise
- ✓ Keep members informed, and explain delays or why a response cannot be given
- ✓ Accept responsibility, and apologise where a mistake has occurred
- ✓ Explain any areas of disagreement. If you cannot do what the member wants, take time to explain why
- ✓ Use plain English, but if technical terms are unavoidable, provide an explanation of what they mean
- ✓ Clarify the outcome the member wants. They may not be clear, and you may need to probe further to find out what they expect. This should help better manage expectations
- ✓ Follow up calls in writing, and keep notes of conversations for a reasonable period, bearing in mind a complaint might only arise some months or years after the conversation. In an investigation, TPO may ask for case notes or recordings of phone calls to evaluate what both parties have said

TPO reminds schemes



"If we contact you about a complaint, engage with us. When we ask for information, as we are entitled to under our evidence-gathering powers, provide us with it as soon as possible. If it is not easy to collate historical or complex data, tell us and explain why it may take time. Remember to provide us with the evidence to support your position regarding the complaint, as well as addressing the issues raised by the member."

TPO has issued a number of other guidance factsheets in recent weeks, including on its Determinations, and its interaction with the Fraud Compensation Fund. See [7 Days](#) for more details.

Legislative changes

TPR's new powers – new criminal offences

See our [Alert](#) for more detail



New civil penalty of up to £1 million

See our [Alert](#) for more detail



Extended information-gathering powers for TPR

Wider powers to inspect premises and to require attendance at interview

See our blog on [TPR's new interview powers](#)



Wider circumstances in which contribution notices can be imposed

See [7 Days](#) for more detail



Climate change / ESG requirements

See box 2 on page 7 for more information



Transfers*

See box 1 on page 7 for more information



Additional notifiable events

See our [Alert](#) and [response to consultation](#) for further detail



Class actions

Possibility of seeing more consumer activism through groups of members taking trustees or employers to task in the coming years, eg in the spheres of climate change or data protection



* We offer training on DB to DC transfers, covering the latest developments in this area, and dealing with member complaints, based on what we see as risk areas, and on real-life TPO and IDRPs cases. Communicating well with members – which includes explaining processes, providing all necessary information, and managing expectations – is key.

Legislative changes cont.

1 Transfers



Long-awaited, the PSA21 has finally ushered in changes restricting statutory transfers, aimed amongst other things at helping prevent scams. Laid before Parliament on 8 November, the changes came into force very swiftly on 30 November, to avoid scammers getting too much of a head start. The new conditions which will need to be met before a statutory transfer can go ahead will increase due diligence requirements, as well as placing a greater focus on trustee decision-making – see our [Alert](#) for further detail.

Schemes should ensure their transfer processes are up to scratch and have evidence to support what steps they have taken to amend existing processes to become compliant with the new law:

- they will need to ensure their administrators have documented what the new process will look like, compared it against the old process and industry guidance, tested it for any practical challenges, and made sure that there is a paper trail to show the scheme has formally approved the new process
- timeframe will be important – whilst TPO had previously held that three months to amend procedures following a significant change in guidance was acceptable, a determination earlier this year noted the “evolving regulatory position”, and that “a period of approximately one month” should be “generally sufficient” for new processes to be put in place
- keep a sharp eye on industry practice – the DWP has developed a set of standard questions for schemes to use, with the aim of keeping due diligence proportionate. TPR has also published guidance on the new conditions. And these join what is an array of legal requirements and broader best-practice guidance, including PSIG’s Code (which is due to be reissued in revised form imminently) and PASA’s DB transfers guidance. Trustees and managers will need to have clear and workable processes in place that take on board all these elements
- communications with members who request transfer values from 30 November will have to comply with the new regime. Members will need to be told in plain English what the requirements are and how the scheme intends to address points that might arise in terms of dealing with any red or amber flags. More generally, booklets or web-based scheme information available to all members will also need to reflect any necessary changes regarding transfer requests, eg referring to the applicable conditions or any impact on timeframes. Managing member expectations will be crucial
- a proportionate balance between speed, cost-efficiency and legal/regulatory compliance will have to be undertaken in order both to meet and monitor the impact of the new requirements. We expect schemes will routinely look at information about how new processes are faring especially over the initial period of implementation and they may even wish to seek member feedback.

2 Climate change



The first wave of new climate risk governance and reporting requirements for certain occupational pension schemes (ie for master trusts and schemes whose net assets are £5 billion or more), took effect on 1 October 2021. Schemes with £1 billion or more assets will follow suit from 1 October 2022. See our [ESG guide](#) for all the detail. Trustees need to make sure they are aware of the relevant requirements and complex deadlines.

Against the backdrop of COP26 and the very public concerns about the need to make net zero commitments, schemes still have much to think about. “Transparency”, “commitment” and “delivery” will likely become key watchwords with scheme members, regulators and other industry players when looking closely at what pension schemes say and do (and equally what they don’t..)

We envisage that trustee communications, investment decisions and responses to questions asked will come under increasing scrutiny, with attempts made to access underlying evidence held by schemes such as reports considered at meetings and trustee or committee minutes. Questions about how certain decisions were made, disclosure of evidence to members and confidentiality are not new, but will likely take on a fresh significance in a new era of openness about climate-related governance.

The risk of members raising complaints or even class actions relating to climate change has the potential to increase rapidly: even before the recent regulations, cases such as those brought by ClientEarth were making headlines. This sort of case is also likely to be reputationally damaging, whether the claim is a procedural one about decision-making (such as refusing to disclose documents) or a substantive one about the scientific climate impact of the scheme’s investment allocation.

Pension scheme trustees might look to learn lessons from similar branches of financial governance, such as the charity sector, with trustees there balancing financial investment gains necessary for the charity to survive against the promotion of the charity’s purposes and the environmental impact of those gains. Undoubtedly, there will be much debate to come in this field!

Contact

Our market leading pensions litigation team is highly ranked by both Legal 500 and Chambers UK. Our “first class” team of pension litigators (The Legal 500, 2022) is experienced in handling cases before TPR, the High Court and TPO, and acts for both claimants and respondents in all forms of pensions litigation.

Sackers is the UK’s leading commercial law firm for pension scheme trustees, employers and providers. Over 60 lawyers focus on pensions and its related areas. For more information on any of the articles in this briefing, please get in touch with Peter or any of the team below, or your usual Sackers’ contact.



Peter Murphy
Partner
D +44 20 7615 9568
E peter.murphy@sackers.com



Arshad Khan
Senior Counsel
D +44 20 7615 9563
E arshad.khan@sackers.com



James Bingham
Partner
D +44 20 7615 9597
E james.bingham@sackers.com



Aaron Dunning-Foreman
Senior Associate
D +44 20 7615 9521
E aaron.dunning-foreman@sackers.com



A very deep team of pensions experts
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Sarah Donnan
Associate
D +44 20 7615 9592
E sarah.donnan@sackers.com

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Recent publications



Sackers [Finance & investment briefing – December 2021](#) takes a look at current issues of interest to pension scheme investors.

Sackers [Quarterly briefing – December 2021](#) highlights significant developments in pensions, covering key areas such as pensions reform, regulatory developments, new legislation and cases.