Sackers

Pensions litigation briefing

May 2024

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

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Abbreviations

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

ESOG: Effective system of governance

FCA: Financial Conduct Authority

HMRC: HM Revenue and Customs

ICO: Information Commissioner's Office

IDRP: Internal dispute resolution procedure

ORA: Own risk assessment

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

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Overview

"Welcome to the latest edition of our Pensions Litigation briefing.

The new year started with a chance to look back at the performance of TPO following the publication of the first annual report in the era of the new Ombudsman, Dominic Harris. It also hinted at things to come with promise of a leaner, quicker service. We summarise over the page some of the key statistics from TPO's work, and his priorities for the coming year.

The spring has also heralded a new beginning. This is in the guise of the new general code of practice from TPR, which sets out its expectations of the conduct and practices of schemes. We highlight a few points of interest from a risk and litigation perspective, including a focus on cyber security.

We conclude this edition with a look at the latest factsheet published by TPO and a recent misquote decision from TPO, a common topic for complaints made by members, as well as rounding up a few topical things to look out for in 2024. What we see is an eventful and challenging year ahead!

Can I take this opportunity to wish you all a great summer to enjoy both the Olympics across the channel and the interesting challenges the pensions world may bring us over the coming months."

Arshad Khan
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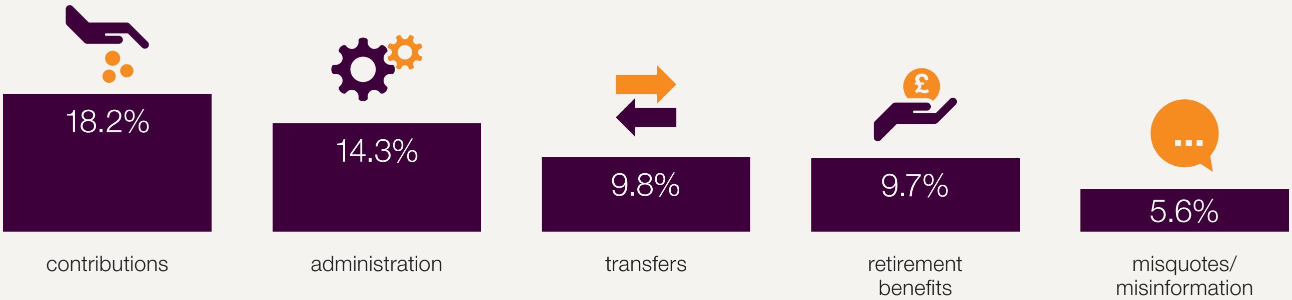
Pensions Ombudsman's annual report

TPO published its annual report and accounts for 2022/23 in December last year, with some interesting facts and figures.

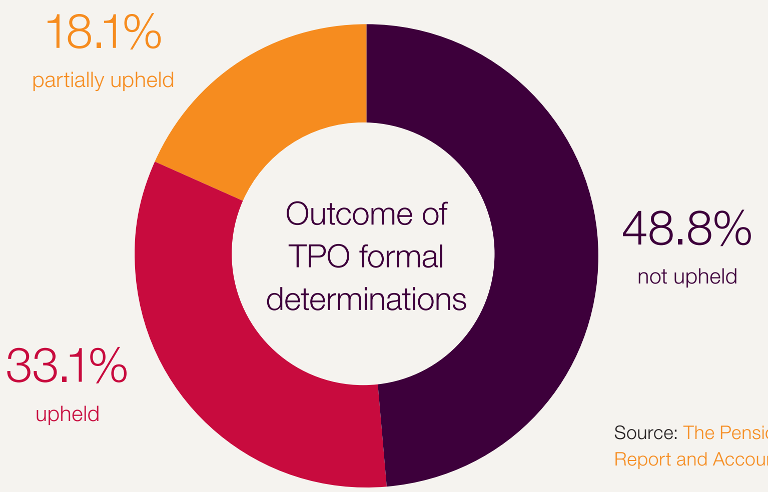
The number of complaints received by TPO continues to increase, with over 7,000 complaints received over 2022/23. This is a 17.1% increase in demand since 2021/22. While TPO expects this upward trend to continue over the next three years, the size of the increase in 2022/23 may present TPO with "more significant challenges" over the years ahead than it had expected.

What do the complaints relate to?

In measuring the top issues being complained about, TPO has, for the first time, including figures from its assessment teams, as they now close more pension complaints at earlier stages, without necessarily going through any of the more formal procedural steps such as the Early Resolution Service, Adjudication Service and TPO determinations. When compared to last year's figures, the top five issues have remained the same. However, there were increases in the proportion of overall closures regarding contribution issues, automatic enrolment and pension liberation. These increases are due to the additional closures from the temporary Casework Support Team who have focused on these topics over 2022/23.



Source: Subject matter of closed pension complaints (top 5), from The Pensions Ombudsman Annual Report and Accounts 2022-23



Source: The Pensions Ombudsman Annual Report and Accounts 2022-23

What's next for TPO?

TPO has also published its Corporate Plan 2023-2026, with its key priorities similar to last year's and include:

- reducing customer waiting times whilst maintaining quality of service
- continuing the "vital work" of the Pensions Dishonesty Unit (which investigates cases where there is alleged dishonesty by trustees)
- reviewing TPO's strategic objectives to ensure they are fit for purpose.

TPO is due to be reviewed as part of the Public Bodies Review Programme in 2024/25.

TPR's general code of practice

Code came into force 28 March 2024

TPR's new general code of practice (the "Code") came into force on 28 March 2024. It brings together 10 of TPR's previous 16 codes of practice into "modules" which are intended to be clearer and more accessible.

Although most of the content is not new, the Code addresses the requirements that apply to TPR, including how trustees should discharge their duty to have an effective system of governance, or ESOG, and the need for certain schemes to carry out own risk assessments, or ORAs.

ESOGs and ORAs

?

What is the ESOG?

Occupational pension schemes are required to have an ESOG. An ESOG should include processes and procedures to ensure compliance across the range of topics covered by the Code. The ESOG must be proportionate to the size, nature, scale and complexity of the scheme.

What is an ORA?

Schemes with 100 or more members that are required to operate an ESOG must carry out an ORA, which is an assessment of how well the ESOG is working and the way potential risks are managed. The first ORA should be prepared within 12 months after the end of the first scheme year that begins after the Code comes into force, at the earliest. For most schemes this will mean preparing the first ORA in 2026.

What should trustees be doing?

The action to be taken will depend where a scheme is on its governance journey. However, all schemes should be focusing their efforts on new topics, or areas of current particular interest for TPR including internal audit, remuneration policy, cyber security (see page 5), and equality, diversity and inclusion.

Updated guidance on reporting breaches of law

Reporting breaches of law

TPR has also updated some of its Code-related guidance, including its guidance on reporting breaches of law. The guidance retains the familiar traffic light structure but has updated several of its examples for red, amber and green breaches, so it is worth a read.

IDRP

The Code includes a module on dispute resolution procedures, which will form part of a scheme's ESOG. The module sets out what trustees must do in respect of setting up an IDRP, as well as incorporating the "reasonable" time limits set out in the old Code of Practice No. 11 (Dispute resolution – reasonable periods). The module also states that trustees should "regularly assess the effectiveness of the dispute procedure", which should be added to a scheme's business plan.

What is the status of the Code?

!

The Code is not a statement of law but it does set out how TPR expects trustees to comply with their legal duties, and courts will take the Code into account in assessing whether legal duties have been met.

Shining a light on cyber security

Updated cyber security guidance

The Code sets out TPR's expectations for trustees in respect of cyber risk. TPR also published updated cyber security guidance at the end of 2023, setting out some more practical steps that trustees can take.

Cyber controls should cover people, processes and technology and be proportionate to your cyber risk. Larger schemes, and those more exposed to cyber risk, will need more robust controls.

What is cyber risk?

Cyber risk can be broadly defined as the risk of loss, disruption, or damage to a scheme, or its members associated with using information technology. Risks can arise not only from the technology itself but also from the people using it and the processes supporting it. It includes risks to information (data security) as well as assets, and both internal risks (for example, from staff) and external risks (such as hacking).

Assess your cyber risk

What do trustees need to do?

TPR's guidance expects trustees to:

- understand the scheme's cyber risk – receive training, know your scheme's "cyber footprint" (the digital presence of all parties involved in your scheme) and check your data map (which service providers hold what scheme data and how the data flows between parties) to identify and address any points of vulnerability
- ensure that the scheme administrator (and others handling scheme data) have appropriate controls in place
- manage incidents that arise – have an incident response plan in place and understand how and when core services will be back online following an incident.

Cyber security in practice – Capita incident

TPR has published a report which outlines how it worked with Capita to assess the risk to pension schemes and their members following a cyber security incident in 2023. It sets out the steps trustees should take in the event of a cyber security incident, including:

- communicate with the affected party to understand how members are impacted. Trustees should understand whether there is likely to be any disruption to payment of benefits, retirement processing and bereavement services
- notify TPR as appropriate and the ICO, if required, if any personal data is involved
- establish whether key services and interfaces with other parties can be operated safely. Restore key services when it is safe to do so, keeping members and regulators informed on the ability to provide these services
- consider whether any immediate actions are required to safeguard members' benefits (eg changes to security procedures)
- communicate with members and signpost to appropriate guidance so they can take the necessary actions to protect their personal information.

Benefit misquotes

Benefit misquotes are a common source of complaints to TPO. Members in these cases are typically looking for the trustee to honour the misquote, particularly if their benefits were overstated.

TPO published a factsheet last year summarising the principles he will apply when determining complaints in this area and it is a useful resource for schemes dealing with these complaints. The factsheet confirms that:

- members are generally only entitled to the benefits provided by the scheme's governing rules, so the circumstances where TPO will require trustees to honour a misquote are rare
- schemes can be required to make good any financial loss which a member has in fact suffered as a result of reasonably relying upon incorrect information – for example, if they made decisions (such as retiring early or reducing contributions) because they expected to receive a certain level of benefits.

It is rare for TPO to require trustees to honour misquotes

If a member has suffered financial loss, TPO will award compensation which puts them back in the position they would have been in had they not received the incorrect information although the amount of such loss would be capped by the level of the misquote.

Awards for distress and inconvenience

TPO can also make an award for distress and inconvenience, even where the scheme has not been required to honour the incorrect information and there's been no financial loss. In our experience, these awards typically range between £500 and £1,000.

Misquotes in practice – Mr S (CAS-36187-V5N1)

Mr S, a deferred member of the scheme, complained that the benefits he was due to receive were lower than the ones he had previously been quoted.

In February 2018, Mr S emailed the then scheme administrators, asking for a figure for his annual pension at age 55. The figures were provided via email and said that they were estimated and not guaranteed. However, based on this figure, Mr S reduced his contributions to his employer's DC scheme and took voluntary redundancy.

In June 2019, Mr S asked the new administrators for a retirement illustration and the quoted benefit was significantly lower than the incorrect 2018 figure.

TPO found that:

- Mr S suffered no direct financial loss as a result of being provided with the incorrect pension figures, instead he suffered a loss of expectation regarding the level of his anticipated pension benefits
- Mr S should not have relied on the 2018 email to make detailed financial decisions in 2019. He ought to have requested a formal retirement pack before making any important financial decisions
- once Mr S was aware that the information was correct, there was still the opportunity for him to mitigate the losses caused by his earlier decisions.

However, TPO agreed that Mr S had suffered "serious" distress and inconvenience and awarded him £1,000 in recognition of this. It is interesting to note that the trustee had agreed to offer £2,000 but Mr S did not accept it.

What’s in store in the rest of 2024?

April 2024

The lifetime allowance was removed on 6 April 2024, with two new allowances, the “lump sum allowance” and the “lump sum and death benefit allowance” being introduced in its place. HMRC continues to publish guidance to help schemes. See our Hot Topic for more information

June 2024

Two appeals are expected to be heard in the Court of Appeal:

- BBC v BBC Pension Trust Limited, in which the High Court considered the restrictions in the power of amendment in the scheme rules
- Virgin Media v NTL Pensions Trustees II Limited, where the High Court found that amendments to the rules of a contracted-out scheme which related to section 9(2B) rights were void and ineffective to the extent that the amendment was introduced without the legally required actuarial confirmation.

These will both be heard in the Court of Appeal and cover amendments to scheme rules, so the outcomes may have wider implications for other schemes.

September 2024

There is a new requirement for DB schemes to have a funding and investment strategy (“F&I Strategy”), in which trustees will set out how they plan to reach low dependency funding by the time the scheme is significantly mature. Trustees will be required to produce their first F&I Strategy within 15 months after the effective date of the first actuarial valuation on or after 22 September 2024

Autumn 2024

An independent review of TPO is expected to be carried out, as part of the Cabinet Office review programme. The aim of the review is to provide a “robust challenge” on the governance, accountability, efficacy, and efficiency of TPO

In 2024

Following its review of the transfer condition regulations in 2023, the DWP is carrying out further work with the pensions industry and TPR “to consider if changes could be implemented to the regulations to improve the pension transfer experience, without undermining the policy intent”

Further ahead

Trustees of in-scope schemes and FCA-regulated pensions providers must connect to the dashboards ecosystem by 31 October 2026. DWP guidance, which trustees must “have regard to”, sets out a phased connection timetable for schemes to connect, starting with schemes with the largest memberships. The first connection date is 30 April 2025, with the smallest schemes having to connect by 30 September 2026

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Contact

Our market leading pensions litigation team is highly ranked by both Legal 500 and Chambers UK. Our team of pension litigators provides “first-class advice” (Chambers & Partners, 2024) and 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.

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Legal 500, 2024

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Recent publications

Our Finance & investment briefing – March 2024 takes a look at current issues of interest to pension scheme investors.

Our Quarterly briefing – March 2024 highlights significant developments in pensions, covering key areas such as pensions reform, regulatory developments, new legislation and cases.

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