

ALLEN & OVERY

Pensions in Dispute

February 2019

Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent Pensions Ombudsman determinations and cases that have practical implications for schemes generally. For more information, please contact pensions.team@allenoverly.com.

Transfers: proportionate due diligence

[Last quarter](#) we reported on a decision where TPO criticised a scheme for conducting too much due diligence. A recent decision confirms that some due diligence (in particular HMRC registration status) remains appropriate and necessary even in relation to a very well-known scheme.

[In this case](#), a member requested a transfer to the Local Government Pension Scheme (LGPS). One of the transferring scheme's due diligence requirements was a recent screen print from HMRC's website showing the scheme details, including Pension Scheme Tax Reference (PSTR) certificate – this was a requirement for all transfer requests except for those to schemes on its 'whitelist' of approved active registered pension schemes. Although the whitelist included LGPS entries, the data did not match for the current transfer. There was a lengthy delay in providing evidence of the PSTR certificate, and it took over eight months from the date of the request to process the transfer.

TPO did not uphold the complaint – the length of time was not unreasonable in the case and was not solely attributable to the transferring scheme, which was waiting for the information from the LGPS. In addition, it was not necessary for the transferring scheme to have used an alternative due diligence process; its check was reasonable in the circumstances.

The two decisions are not inconsistent as the earlier one did not suggest that seeking confirmation of HMRC registration is unnecessary; it was the additional due diligence conducted in the case that had been criticised.

What does this mean for trustees?

Trustees and administrators should ensure that the due diligence that is being conducted is *proportionate* in the particular circumstances. For more information about industry standards of due diligence, see the [Code of Good Practice on Combating Pension Scams](#).

Transfer deadlines: financial advice

In April 2015, the government introduced a requirement for trustees to check, in certain cases, that a member has received appropriate independent advice before transferring out. This applies where a member with safeguarded benefits valued at over GBP30,000 is seeking to transfer to another scheme which offers flexible benefits. This is known as the 'independent advice requirement'. To read more, [click here](#).

[In this case](#), a member sought to transfer multiple section 32 policies with the same administrator to a QROPS, two of which were subject to the statutory independent advice requirement. Paperwork issued by the administrator referred to the requirement, including a declaration that the member had been informed of and understood this. The member returned the transfer documents on time but the confirmation of financial advice was received approximately six weeks late. The member complained as the two affected transfer requests were being treated as new requests (meaning they would be subject to a new overseas transfer charge regime).

TPO did not uphold the complaint. The member had not complied with all of the statutory requirements because the confirmation of advice had been provided after the statutory deadline. The administrator was correct to state that the requests to transfer the two affected policies needed to be treated as new requests if the member still wished to transfer. It was reasonable to expect that the member and his financial adviser should have been aware of the deadline.

What does this mean for trustees?

We are aware of a number of cases where confirmation of advice has been submitted late. Trustees and administrators may find it useful to refer to this decision in the event of a complaint that a transfer request is being treated as a new request where there has been a failure to submit the confirmation in time.

Update: GMP equalisation

[Last quarter](#), we reported on a landmark ruling that pension schemes must equalise for the effects of unequal guaranteed minimum pensions (GMPs).

At the end of last year, the High Court provided clarification on the GMP conversion method – [click here](#) for more detail.

What does this ruling mean for trustees?

Most trustees and administrators are at an early stage of assessing the impact of the decision on their scheme. The new judgment includes further guidance on GMP conversion, which the judge concluded could be used with sponsor consent. However, it is unlikely that schemes will opt for this method in the short-term while we await further government guidance (and potential changes to the legislative framework for GMP conversion).

Update: compensation awards for non-financial injustice

In September 2018, TPO published new [guidance](#) on levels of compensation awards for non-financial injustice caused by maladministration. The new fixed bands are: no award (apology sufficient); GBP500; GBP1,000; GBP2,000; and higher than GBP2,000.

Trustees and administrators are not strictly required to follow this guidance when offering compensation to a member (i.e. to settle a complaint). However, it is intended to provide an indication of the level of compensation likely to be awarded by TPO, in the event of a successful complaint of maladministration.

A new briefing note on these issues will soon be available on our [Pensions in Dispute website](#). It will discuss recent compensation awards made by TPO, and the guidance that trustees and administrators can take from these decisions.

What does this mean for trustees?

Recent decisions indicate that uncertainty remains even within TPO's office about how to apply the fixed bands, with TPO and the Adjudicator disagreeing about the appropriate level of compensation. This is expected to settle over time, as experience applying the new bands grows.

Trustees and administrators will be reassured that it continues to be uncommon for awards to be made at the level of GBP2,000 and above.

Trustee indemnity for appeal costs

The High Court has provided guidance on indemnities for trustees out of scheme assets for litigation costs – this is in the context of the cost of an appeal to the Supreme Court in the long-running *BA* case. In this case, a capped indemnity was granted. [Read more](#)

Watch this space

- Changes may be made to TPO's processes, in light of a recent government consultation. TPO's 'early resolution' process was one of the key issues covered. [Read more](#)
- We are awaiting the Court of Appeal's decision in *Burgess v BIC*. The case involves a dispute over whether pension increases were properly paid (or whether these are overpayments). The decision is expected to provide guidance on the recovery of overpayments and recoupment by trustees – the High Court had held that the increases were properly paid (and were not overpayments) but went on to discuss these issues. To read more, [click here](#).

Contact us



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Jason is a Counsel in the Litigation group. He specialises in all aspects of pensions disputes, including advising clients in relation to internal disputes and disputes before the Pensions Ombudsman, the Financial Ombudsman Service, the Pensions Regulator, the PPF Ombudsman and the courts. Jason is ranked in Chambers & Partners Directory in the field of Pensions Litigation.