

# Pensions in Dispute

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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 that have practical implications for schemes generally.

## Serious ill-health: handling applications

When a member requests serious ill-health commutation, it is well established that the trustees need to act with appropriate urgency. When considering complaints about the handling of applications, two recent decisions by the Pensions Ombudsman (TPO) have emphasised the importance of the context and trustee knowledge about the member's life expectancy.

In **PO-15842**, Mr N had told his employer that he had a terminal diagnosis and wanted to apply for serious ill-health commutation, but life expectancy was not expressly discussed at that time. It took around four months for the relevant medical appointments and paperwork to be completed, and the scheme medical adviser provided confirmation of entitlement approximately ten days before Mr N's death. Mrs N was originally told after Mr N's death that the ill-health award had been successful and would be implemented, but this was subsequently processed as a death in service award (the scheme rules treated Mr N as being in pensionable service at the date of death due to his outstanding holiday entitlement).

TPO did not uphold the complaint, as he considered that a death in service award was the correct approach under the scheme rules, and also considered that the timescales for completing the various steps were reasonable in the circumstances and there had been no avoidable delays.

In **CAS-30953-N5H6**, Mr E (a deferred member) had telephoned the Trustee to inform it that he had

an extremely short life expectancy with potentially only four months left to live. The administrator promptly sent him a letter with an application form and contacted the Trustee, but the form was not returned before his death a month later. Mrs E said that he had not been well enough to complete the form and complained about not being informed that someone could submit the form on his behalf.

TPO did not uphold the complaint: the Trustee had acted with appropriate urgency, and had acted correctly by asking for the form to be submitted. Unless there was a specific enquiry about whether someone else could complete the form, the Trustee/administrator were not required to provide further information as they were only expected to act on the information they had at the time (about Mr E's life expectancy). In any event, even if the form had been submitted, TPO considered that it was more likely than not that the process would not have been completed before Mr E's death.

### What does this ruling mean for trustees?

In both of these decisions, TPO has emphasised the information held by the scheme when considering whether the handling of the application was reasonable. Notwithstanding this, it would be prudent for administrators to proactively obtain information on life expectancy early in the process, and to act with appropriate urgency, to reduce the likelihood of a future complaint.

## Successful change of position defence

Where a pension has been overpaid, the starting point is to try and recover the overpayment. Change of position – where a member has changed their position such that it would be inequitable to require repayment of part or all of the overpayment – is one defence to recovery, but the member must have acted in good faith. **PO-23848** is an example of a successful change of position defence, with an interesting discussion of ‘good faith’.

Mrs S complained the administrator was seeking to recover an overpayment of her widow’s pension (the scheme regulations provided that this was to cease on subsequent remarriage or cohabitation). She had been in receipt of a widow’s pension since 1999. In 2016, Mrs S completed a declaration as part of a verification exercise, stating that she had been cohabiting since 2004. She was then notified that her pension should have ceased in 2004; the administrator said she would have been informed of this condition in a leaflet issued when her widow’s pension commenced, and that annual newsletters contained a request to contact the scheme if cohabiting. Mrs S argued that recovery should not have been sought for various reasons, including that she should not be treated as cohabiting because there was no financial (inter)dependence, and that she had a change of position defence.

TPO rejected the arguments that she was not cohabiting for the purposes of the scheme rule – there was no specific definition and it was to be given its ordinary meaning; the administrator was not required to interpret it as requiring financial dependency or in line with HMRC requirements.

However, TPO considered that Mrs S had a valid change of position defence up to the date of her pension ceasing. He was satisfied that she had irreversibly spent the monies on an increased standard of living that she would not otherwise have incurred; and that she acted in good faith and did not have actual knowledge of, or turn a blind eye to, the fact that her pension should cease. In reaching this conclusion, TPO accepted that she may not have read in detail the leaflet sent to her after the death of her spouse, but also that she had not read, or read in detail, newsletters sent to her over the

years in which members were asked to contact the administrator on cohabitation (implying that this was likely to have an impact on pension payments). He commented that the decision that Mrs S did not have the requisite knowledge was a finely balanced one, but was consistent with her reaction after she was notified of the overpayment. There was no other reason to believe she was not truthful, and mere carelessness was insufficient to demonstrate bad faith. He commented that he did not think it was appropriate to start from a position that members may not always be truthful, or that they generally read and understand all the pensions communications sent to them.

The administrator was directed to: pay arrears of GMP (which it had offset against the overpayment) plus interest; not take steps to recover the overpayments for which Mrs S had a defence; and pay £500 for distress and inconvenience.

### What does this ruling mean for trustees?

This type of rule is a feature of some public service schemes. The discussion of good faith in relation to change of position will be of interest – TPO emphasised that carelessness does not amount to bad faith, and was prepared to accept that the member had not read communications sent to her over the years.

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