

## *Pensions in Dispute*

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 court and Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact [pensions.team@allenovery.com](mailto:pensions.team@allenovery.com).

### **Communicating with members – what you say and how you say it**

*It's important to get both the content and delivery of member communications right, not only to meet legal compliance duties but so that members get the information they need about their pension rights, and so that you minimise future complaints. Recent decisions have brought a number of different issues in this area under the spotlight.*

The recent decision in *IBM v Dalgliesh*, for example, looked at how different communications are understood by readers. The court ruled that members might reasonably treat different types of information with differing degrees of scrutiny or care – for example, a webinar is designed primarily to be watched and heard once with viewers taking an overall message, not to be transcribed and read as a document. Members might be expected to devote time and attention to understanding a letter, but would not necessarily be expected to read every word of other ancillary material, such as a Q&A document. For more on this decision, click [here](#) for our summary briefing.

A similar point has arisen in a recent Pensions Ombudsman decision ([Gregory](#)). The case concerned the closure of a trust-based DC scheme and the transfer of a member's assets to a GPP arrangement. Member communications stated that 'Your transfer value must be invested in exactly the same funds and investment proportions as your existing contributions'. A separate FAQ document clarified that 'existing contributions' here meant regular monthly contributions rather than a member's aggregate account. Mr Gregory's investments were held 80% in equities and 20% in cash, but he had given instructions the previous year that all his future contributions should be allocated to cash, leaving existing investments unchanged. He complained that 100% of his assets had been transferred to a cash fund in the GPP.

The Ombudsman ruled that the wording in the main member communications document was unclear and that the trustee could not assume that information given in the form of FAQs would necessarily be read, since 'FAQs are there in case of questions that the reader may have, not to be read in detail as a way of finding information for the first time'.

**Direction:** The trustee could not rely on the statements made in its FAQs and its provision of misleading information in other communications was maladministration. The trustee was directed to adjust the units allocated to the member's account as if assets had been purchased in accordance with his intended 80/20 split as from the transfer date.

**Comment:** *The key point is that any necessary detail (and an appropriate level of accuracy) must be contained in the main documents provided to members. Although FAQs and webinars are useful and increasingly common ways of providing information, it may not be possible to rely on those documents if trustees or scheme sponsors need to prove that specific information contained in them has been given to a member. For more commentary on delivery mechanisms, click [here](#).*

### **Changing DC investment options**

*Many trustees are reviewing the range of DC investment options they offer to members, in light of the DC Code. One key question, if you decide to make changes, is what to do about assets in existing, perhaps underperforming, funds which you no longer wish to offer to members. Should you continue to allow contributions to those funds by members who have previously selected them, or close them completely to new contributions, or even transfer existing assets to new investment options, without member consent if necessary? The Ombudsman has provided insight into the reasonableness of trustee decisions in an exercise of this type in another recent determination ([Lupton](#)).*

The trustees decided to alter the investment options available to members and sent out communications from 21 May 2012 ahead of a transfer in July. Members were asked to choose from three lifestyle options or a range of self-select options; a decision was required by 19 June. The existing investment options were unavailable from 30 June. A transfer blackout period was put in place from 15 June until the transition process was completed. In the absence of an active choice by any member, the trustees transferred the member's funds to the new option most closely matching his existing choice.

The complainant said that he had not been made aware that the trustees could transfer existing funds without the express consent of members, and challenged their right to prevent individual transfers out of the plan during the blackout period. Also, as the plan rules allowed investment options to be retained on a 'no further contributions' basis, he argued that the trustees should be required to justify the decision not to retain the existing funds.

The Ombudsman confirmed the trustees' power under the rules to select new investment options and to force the transfer of members' funds into new options. The rules did not specifically allow the trustees to impose a blackout period for transfers, and the Ombudsman commented that it would be maladministration to delay a transfer even within the six-month statutory deadline, if there was no good reason for doing so. However, while the transition exercise was taking place it would not have been possible to action a transfer, so a delay during this period was not maladministration.

The Ombudsman ruled that the trustees had given a rational explanation of their reasons for not retaining the old funds alongside the new ones (for example, the potential confusion to members and increased level of governance and monitoring required if both sets were retained). They were not required to provide any further justification.

**Direction:** Complaint not upheld (save for GBP100 compensation awarded for minor delay in the IDR process).

**Comment:** *This decision will be of interest to trustees reviewing and updating DC investment options in light of the new Code. It provides a helpful insight into trustee considerations and the Ombudsman's view of what is reasonable in this type of exercise. Importantly, the transfer rule in this case was very detailed and provided for a range of possible trustee options in relation to closing/withdrawing investment options. It also dealt with the transfer of members' assets in default of any active choice of a new investment option. Trustees considering a similar type of exercise will need to review their rule in advance and update it if necessary to give them the flexibility they require.*



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## June 2014

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