

ALLEN & OVERY

Pensions in Dispute

June 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 that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

Pension increases could not be validated: *BIC v Burgess*

The Court of Appeal has ruled that increases to pensions (in excess of GMPs) for pre-April 1997 service were not validly introduced into the BIC UK Pension Scheme.

In this case, there was no deed of amendment, and subsequent versions of the deed and rules were silent on the increases, though they were referred to in trustee minutes and in an announcement to members in 1991/1992. The appeal focused on whether the increases could be validated by the deemed exercise of a power in a subsequent deed and rules (which had retrospective effect) – [click here](#) to read more. The court concluded that it was not possible to validate the increases in this way, and its decision emphasised the importance of complying with formalities requirements.

The court's provisional view was that the trustee minutes only recorded a resolution on future policy, and that if the minutes had been intended to immediately alter the rules (as a written resolution), then the text of the amendments could be expected to be set out in a document signed by all of the trustees as well as by BIC in its capacity as principal employer.

Finally, this litigation has also been of interest more generally in relation to the recovery of overpayments. The earlier High Court decision included non-binding comments that:

- Equitable recoupment is not subject to a six-year limitation period. Recoupment involves reducing future pension instalments to recover an overpayment.
- A determination by the Pensions Ombudsman (TPO) is not sufficient for trustees to exercise recoupment against a member where the amount is disputed. TPO has already indicated that he disagrees with this view, leading to some uncertainty.

The Court of Appeal did not comment on these points. To read more about both of these issues, [click here](#).

What does this mean for trustees?

Occasionally it is discovered that, potentially after many years, a scheme practice does not form part of the scheme's formal documentation (or it is questionable whether this is the case). This decision is a reminder that there are limits to the extent to which courts will 'rewrite history' to validate past actions.

No reasonable reliance on incorrect statements

In 1999, Mr N had been sent documentation when his benefits were secured with an insurer that clearly referred to a state pension offset. Benefit estimates in 2000, 2002 and 2010 did not mention the offset. After receiving quotations in 2016 which included the offset, Mr N complained ([PO-24551](#)) that he had relied on the multiple incorrect statements. TPO decided that it was not reasonable for Mr N to rely on the incorrect information. He should have identified the mistake in 2000 – the statement quoted a much higher annual pension and was received within a year of the correct figures. However, Mr N was awarded GBP500 for significant distress and inconvenience.

What does this mean for trustees?

It can be difficult for members to prove that they reasonably relied on incorrect information to their detriment where they have previously been provided with the correct information and could have identified the error (or made further enquiries). Even if incorrect information has been provided over a long period, it is important to assess whether, in the circumstances, it was reasonable for the member to rely on it. To read more about this issue, [click here](#).

Update: recent compensation awards

TPO guidance on compensation awards for non-financial injustice caused by maladministration (commonly called compensation for distress and inconvenience) is based on the following fixed bands: no award (apology sufficient); GBP500; GBP1,000; GBP2,000; and over GBP2,000. In recent months, awards above GBP1,000 have remained relatively rare. There have been several awards of GBP2,000, and multiple awards of GBP5,000 (arising out of one set of circumstances).

The GBP5,000 awards related to an [exceptional case](#) where the trustees of a small scheme were found to have committed multiple breaches of trust and maladministration, in a situation where there had been significant losses of member funds.

Two examples of awards of GBP2,000 are given below:

Mr T ([PO-24307](#)): Mr T had been given incorrect information that he was entitled to benefits (in fact these had been transferred out many years ago and he was receiving the benefit via another scheme). He claimed to have relied on this to his financial detriment. There had been communications with the provider on multiple occasions over several years. TPO was not convinced Mr T would have acted differently but considered that compensation for severe distress and inconvenience was justified; the Adjudicator had commented that the provider had ‘made numerous errors and compounded them over a prolonged period and missed opportunities to remedy these mistakes’.

Ms T ([PO-24129](#)): Ms T complained that she was entitled to special membership status under her pension scheme, meaning she could retire early without reduction. There were various qualifying conditions. Ultimately, Ms T was not entitled to the special status, but she had received incorrect and misleading information. In deciding the appropriate level of compensation, the Deputy PO noted that she had ‘taken into account Ms T’s proximity to her preferred retirement age when the correct position was eventually clarified... [the administrator] made a series of serious administrative errors by providing misleading and contradictory information, raising Ms T’s expectation that she could take full pension from age 55...’.

What does this mean for trustees?

Trustees and administrators are not obliged to follow the guidance and past decisions when offering compensation to a member (i.e. to settle a complaint). However, these can provide a useful indication of the level of compensation likely to be awarded by TPO, if the member is successful. Recent trends indicate that the higher bands of compensation remain uncommon.

Watch this space

- Changes may be made to TPO’s processes in light of a 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 *Granada v TPR* (the long-running *Box Clever* litigation). [Read more](#)
- We are awaiting a decision by the Court of Justice of the European Union in *Safeway v Newton*, an equalisation case. [Read more](#)

Pensions Litigation Firm of the Year

We are pleased to announce that Allen & Overy has been named both Pensions Litigation Firm of the Year and Pension Lawyers of the Year at the UK Pensions Awards 2019.

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. The Chambers & Partners Directory includes quotes from clients that Jason is ‘an extremely unflappable presence on challenging projects’ and ‘provides technically complex advice in a calm and straightforward manner’.