

2 September 2019

Pensions: what's new this week

Welcome to your weekly update from the Allen & Overy Pensions team, bringing you up to speed on all the latest legal and regulatory developments in the world of occupational pensions.

Assessing investment loss after transfer delay: *Tenconi* | Latest HMRC newsletters | Government publishes review of TPO

Assessing investment loss after transfer delay: *Tenconi*

The High Court has held that the Pensions Ombudsman (TPO) applied the wrong test when determining a complaint that delays in a transfer to a SIPP, which meant that the member had not been able to invest around the time of the Brexit referendum in 2016, had caused financial loss: *Tenconi v James Hay*.

TPO found there had been undue delay in processing the transfer but that the member had not suffered any investment losses, although he should be awarded GBP2,000 for distress and inconvenience. In TPO's view, in this case the loss claimed by the member was not measurable due to the lack of certainty, and it was not reasonably foreseeable to the transferring provider that he would suffer the losses being claimed.

The judge concluded that TPO was mistaken when assessing the foreseeability and measurability of the loss. On foreseeability: it is 'obvious' when a member requests a transfer that it is for the (possible) purpose of investment and, if there is a delay caused by maladministration, it is likely or foreseeable that the member could suffer loss if there are market spikes (or perceived spikes) in the relevant period. On measurability: TPO had applied too high a test, and confused the issues of recoverability and quantification. The judge remitted the matter to TPO for reconsideration, commenting that the following approach should be adopted:

1. Identify the date on which the funds should have arrived (on the basis of no maladministration occurring).
2. Determine what the member would have done if the funds had arrived by that date – the burden is on the member to establish this on the balance of probabilities. If TPO accepts that the member intended to invest to take advantage of market changes related to the Brexit vote, the member would not need to show precisely which shares he would have bought. TPO would need to consider the nature of the portfolio likely to have been bought, and to assess whether the member's submissions are based on hindsight – TPO could also look to the member's pattern of investing to assess this. These are factual questions for TPO to decide – the judge did not express a view on whether the member's claim should succeed.

The decision is a topical one, given the recent focus on speeding up transfer times (see [WNTW](#), 15 July 2019), and potential Brexit-related market volatility.

Latest HMRC newsletters

HMRC's latest Pension Schemes Newsletter ([no. 113](#)) contains a clarification for administrators about issuing annual allowance pension saving statements, and information for schemes operating relief at source (including a reminder about submission of the annual claim form).

HMRC's latest Countdown bulletin ([no. 48](#)) includes information for administrators dealing with reconciliation processes after the end of DB contracting-out. The latest edition informs schemes planning to carry out a GMP conversion exercise that they do not need to send form CA8476 to HMRC when rights are converted. It is a condition of the current legislative framework for GMP conversion that HMRC is notified – however, since HMRC is no longer tracking contracted-out rights, this condition is likely to be removed when the government makes its planned changes to the legal framework for conversion. The latest comment by HMRC supports this view.

The bulletin also contains information on the final data cuts that HMRC has planned as the last step in the Scheme Reconciliation Service (SRS) process, including details of information to be provided to ceased schemes. HMRC currently expects to issue all data by the end of December 2019.

Government publishes review of TPO

The government has published a high-level [tailored review](#) of the Pensions Ombudsman (TPO). The review found that, at present, there was no strong case for merging TPO with the Financial Ombudsman Service, but recommended that the two organisations continue to collaborate to reduce potential confusion and duplication. The review made a number of other recommendations, including clarifying the role of the Early Resolution Service (and providing assurance that cases proceeding to adjudication will be handled independently), expanding liaison with stakeholders, and refreshing and updating TPO's website.

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