

Pensions in Dispute

February 2020

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.

ETV exercise: member passed away during cooling-off period

In [PO-19486](#), a member passed away during a cooling-off period (COP) after electing for an enhanced transfer value (ETV) as part of an ETV exercise. His widow complained that the transfer had not been processed and that she had been offered a survivor pension instead. The member had told the trustee that he had been diagnosed with stage four cancer, but the trustee was not aware that the cancer was terminal.

The Deputy Pensions Ombudsman concluded:

- the COP was an integral part of the ETV offer; it was recommended good practice and not inappropriate;
- the trustee had caused no delays and the member died before the transfer could have been processed even if there had been no COP; and
- the receiving provider had refused to accept the transfer after the member's death, and the trustee had no discretion to pay it to Mrs H or another scheme.

What does this mean for trustees?

The circumstances of this decision are, thankfully, relatively rare – but there is of course always a possibility that a member might pass away after an application/election is made but before benefits are put into payment or a transfer is completed. Provided that there has been no delay on the part of the trustees or administrator (and especially where the death is unexpected, or the trustee was unaware of the severity of the member's condition), a complaint of maladministration solely on that basis is unlikely to succeed.

This decision is a reminder of the importance of making clear in the offer paperwork and member communications that all stages of a process must be completed before action can be taken (for example, in this case, before the transfer could be made).

ETV exercise: existing transfer request

In [PO-23202](#), a member complained after transferring out of the scheme. She had submitted a transfer request form; before the final paperwork was submitted, members were notified of an ETV exercise. The member claimed that she did not receive this and that if she had, she would have delayed her transfer. She complained that the trustee had been negligent.

The Pensions Ombudsman (TPO) concluded that the trustee had done enough to signpost the offer:

- the first letter was sent to the correct address (even though it had not been received); and
- the communications exercise was sufficient – the trustee was not required to proactively contact members in the process of transferring out to advise them of the enhancement offer.

As the member had completed the transfer request and discharge paperwork before the ETV warm-up pack was sent, TPO considered that she was satisfied with the transfer value quote and had committed to the transfer.

What does this mean for trustees?

TPO's finding that the trustee did not need to do more to notify members of the ETV exercise, and did not need to proactively contact members in the process of transferring out, is helpful.

Watch this space

- Changes to TPO's processes are [expected](#).
- We are also awaiting further details of the impact of the *McCloud/Sargeant* litigation on public sector pensions. [Read more](#)
- The Court of Appeal will hold a further hearing in *Safeway v Newton* in July. [Read more](#)



Pension liberation/scams

Trustees and administrators are seeing numerous complaints about historic transfers-out connected with pension liberation/scams. A recent TPO decision may be helpful for schemes addressing complaints about transfers made shortly after the Regulator’s February 2013 guidance was published.

In [PO-12324](#), the member transferred out in March 2013. He complained that the scheme had not carried out sufficient due diligence, and had failed to adequately inform him about pension liberation. The scheme had not updated its procedures following the guidance until May 2013 – TPO considered this delay was not unreasonable. Although the scheme did not provide the Scorpion leaflet, it had given sufficient information (and warnings) about pension liberation in its own leaflet. The member raised the [Police Pension Scheme decision](#), but TPO said that the warning the member had been given meant he was in a different position.

What does this mean for trustees?

This decision is a further illustration of what TPO considers to be a reasonable implementation period following the February 2013 guidance. It also, as always, underlines the importance of providing information to members about scam risks.

Privileged revaluation on closure

- TPO has recently heard an unusual complaint about revaluation of benefits in a closed final salary section.
- Members continuing in service with an employer often receive privileged revaluation treatment on a closure project, or some form of underpin. Here, the member complained that his final salary benefits were being revalued less favourably than the benefits of members who had left pensionable service.
- For legal reasons, the member’s argument was not correct and TPO did not uphold the complaint, but the case is a reminder of the importance of good communications, which might have helped to avoid this dispute. You can read more about this decision in my recent [blog post](#).

Disclosure of climate change risks

In [PO-27469](#), TPO was asked to consider the transparency of trustee decision-making in relation to climate change risks. A member complained that he had not been given enough information about how the risk of climate change was being taken into account, both in relation to scheme investments and in connection with the business of the employer.

TPO considered that the trustees had met their obligations (read more [here](#)). The facts predate the new trustee obligations in relation to statements of investment principles and disclosure of information (to read more, see our briefing [ESG, stewardship and transparency in pension scheme investing](#)).

What does this mean for trustees?

Disclosure of climate change-related information is a rapidly-evolving area. This is an emerging source of member litigation risk and a potential focus for activism (in this case the member was supported by ClientEarth), as well as a regulatory matter.

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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 ‘brilliant’, ‘unflappable, easy-going and very hard-working’ and has ‘really good market insight and technical knowledge’.



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