

ALLEN & OVERY

Pensions in Dispute

June 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@allenoverly.com.

Trivial commutation lump sum: option withdrawn, complaint not upheld

The Pensions Ombudsman (TPO) has recently dismissed a [complaint](#) by a member who had elected to take her benefits as a lump sum trivial commutation payment (TCLS), where the option to take a TCLS was suspended until further notice as a result of the *Lloyds* decision. The member complained that, because she had signed the paperwork, her TCLS should have been paid.

TPO concluded that, although the member had signed the paperwork, the process was not complete and that in the interim the TCLS option had been removed for valid reasons. The trustees' decision to withdraw the TCLS option following legal advice was a legitimate one.

What does this mean for trustees?

Following the *Lloyds* decision, it was common practice for schemes to suspend the option for a TCLS due to tax risks (HMRC guidance on this issue is expected, although there is no indication of likely timing). This decision will be helpful for schemes responding to similar complaints.

Transfers: TPO directs reinstatement

Trustees often ask about the circumstances in which TPO might direct reinstatement of benefits in connection with a dispute over a transfer.

In [PO-20365](#), a member complained about missing benefits – the scheme said she had transferred out in 1989 (and had copies of contemporaneous letters to the receiving administrator stating that a cheque for the full transfer value was attached, and a letter to the member confirming the payment). However, neither the receiving scheme nor HMRC had any record of the receiving scheme being liable for the member's benefits. TPO concluded that, on the balance of probabilities, the member had not transferred out, and the transferring trustee was directed to reinstate her benefits.

In [PO-22965](#), TPO directed a SIPP provider to pay the amount of a transferred sum (plus interest) into the member's SIPP, following a complaint about inadequate due diligence checks in 2017. TPO concluded that the provider had not carried out sufficient due diligence, including by not contacting the member. Although a full check would have been unlikely to categorically identify the receiving scheme as a scam, the provider was responsible for putting the member in a position where he could make an informed decision.

What does this mean for trustees?

It is rare for TPO to direct the reinstatement of benefits in relation to a transfer, and these decisions illustrate the risks in very different contexts.

In the first case, it is unsurprising that the trustee was not able to obtain copies of bank statements or 'definitive' evidence so many years later. The decision suggests that, where a receiving scheme disputes that a transfer in took place at all, TPO may apply a high bar for the trustees of the transferring scheme. However, if the HMRC record had been different, or was not applicable because the scheme was not contracted-out, TPO might have reached a different conclusion.

The second case is the latest decision reinstating a member after insufficient due diligence. Once again, it highlights the importance of ensuring that transfer due diligence and procedures are in line with best practice, including contacting the member where appropriate. A key issue here for TPO was that the member had been deprived of the opportunity to make an informed decision (as, if he had been contacted, his answers would have led to the member being warned by the provider).

Offsetting underpayment against overpayment

The Deputy Pensions Ombudsman (DPO) has recently dismissed a [complaint](#) by a member about offsetting an underpayment against an overpayment. The member was told that her bridging pension had been overpaid but her lifetime pension underpaid (she had been overpaid from 2009-2013, but underpaid from 2013-2018); that the arrears were being offset against the past overpayment; and that the Trustee was not seeking recovery of the net overpayment (approximately £1,200).

The DPO concluded that, applying the principles in *Burgess v Bic*, no limitation period applied to recoupment of past overpayments (ie by not rectifying past underpayments). The DPO considered it unnecessary to make a finding about whether the Trustee's actions constituted maladministration (in connection with section 91 of the Pensions Act 1995) because she was satisfied that the member had benefitted financially overall. There was no compensation award for distress and inconvenience.

What does this mean for trustees?

The DPO's decision recognises that the Trustee's approach had not disadvantaged the member, although the enquiries and complaint could have been handled better. This decision will be of interest to trustees when carrying out rectification exercises (including GMP equalisation).

Watch this space

- We are awaiting a further judgment on GMP equalisation (in relation to transfers-out), following a further hearing in the *Lloyds* case.
- Changes to TPO's processes are [expected](#) following a government consultation (although there has been no progress for some time).
- The government will [consult](#) on proposals for changes to public sector pensions following the *McCloud/Sargeant* litigation.
- The Court of Appeal will hold a further hearing in [Safeway v Newton](#) in July.
- The Supreme Court has [refused permission to appeal](#) in the *Box Clever* litigation.

PPA: scheme administrator liable

Last year we [reported](#) on a decision that a scheme administrator was liable for negligent misstatement after it sent letters to members with protected pension ages (PPA) referring to tax-free lump sums, where it was aware that the members were due to start post-retirement employment (which would result in loss of PPAs).

TPO has recently upheld [complaints](#) by two members against an employer (who was treated as the scheme administrator for tax purposes) in similar circumstances. The first was upheld on the ground of negligent misstatement; the second on the ground that the employer had failed in its duty to act with reasonable care and skill when giving the member relevant information at the point he accepted a further contract.

What does this mean for trustees?

The decision is a reminder to take particular care around the retirement of employees who benefit from transitional tax protections. TPO also concluded that an outsourced administrator was not responsible as it had no knowledge of the member's contractual situation.

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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, stating that Jason is 'brilliant', 'unflappable, easy-going and very hard-working' and has 'really good market insight and technical knowledge'.

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