

Pensions in Dispute

November 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.

GMP equalisation: transfers-out

The High Court has now handed down its **decision** in the second Lloyds case on GMP equalisation. The **first decision** (in 2018) established that trustees of defined benefit occupational pension schemes had a duty to equalise benefits for male and female members in relation to the unequal effect of guaranteed minimum pensions. The judge was then asked to answer a number of additional questions relating to past transfers-out.

For past statutory transfers, the judge concluded that the payment of an inadequate transfer value was in breach of trustees' statutory obligations and that the trustee did not benefit from a statutory discharge (or, based on the scheme documentation in this case, a discharge based on the rules or sample agreements with members). He ruled that claims would not be time-barred under statute and that the forfeiture rules of the relevant schemes did not operate so as to limit member claims. You can read more about the decision in our **briefing**.

What does this ruling mean for trustees?

Although the judge set out some clear principles, unanswered questions remain. Implementation is likely to be complex for schemes (which may hold very limited records, or potentially no records at all for members who transferred out many years ago). Trustees should liaise with administrators and seek advice on the implications of the ruling for their equalisation exercises.

Member incorrectly informed of fund switch, £1,000 compensation

The Pensions Ombudsman (TPO) has recently **directed** an administrator to pay £1,000 compensation for distress and inconvenience, after a member complained that he was given incorrect information about a fund switch and had suffered financial loss. The trustee had recently decided to close Fund A and switch all existing holdings to Fund B. Shortly before the blackout period, the member instructed the administrator to switch his funds to Fund A. He was told that the switch had been carried out and, for months afterwards, the online portal incorrectly showed benefits in Fund A.

TPO concluded that the administrator should have informed the member that his instruction would result in the funds being invested in Fund B; the incorrect information on the portal was also maladministration. There was no financial loss but the member had suffered serious distress and inconvenience: the service from the administrator was below an acceptable level; he had had to repeatedly contact the administrator; and the main part of the complaint was not initially addressed.

What does this ruling mean for trustees?

The decision is a reminder to ensure that administrators have adequate processes in place when trustees are replacing a fund, and to appropriately handle contact and complaints from members. It may also be of interest in the context of any delayed fund switches earlier this year.

Investment loss: *Tenconi*

Last year we reported on a case where a member complained he had lost the opportunity to invest around the time of the Brexit referendum due to a delayed transfer; and on his subsequent appeal against TPO's determination of his complaint.

TPO has now **upheld** the complaint after it was remitted to him by the High Court, and awarded the member £43,700 plus simple interest (8% pa). There was no award of compensation for distress and inconvenience, as £2,000 compensation for this had been paid after the previous determination.

In reaching his decision, TPO considered that if there had been no maladministration, the transfer would have been completed by 23 June 2016. TPO was satisfied that, on the balance of probabilities, the member would have invested the full amount in the FTSE 100 Index immediately after the referendum. TPO noted that the member had given a detailed explanation of his attitude to investing and put forward a good case for investing in the FTSE 100 rather than individual stocks.

What does this ruling mean for trustees?

The High Court ruled that TPO had applied too strict a test when considering financial loss, so it was always likely that the member would succeed on reconsideration. Members complaining about transfer delays and related investment loss are likely to point to this decision.

High Court: fraud compensation

The High Court has **clarified** issues relating to the Fraud Compensation Fund (FCF), including confirming that claims arising from pension scams may be eligible for FCF compensation.

What does this ruling mean for trustees?

The decision will be of general interest to trustees. The FCF is expecting a number of applications for compensation to be filed – depending on the quantum of successful claims, it is possible that the industry levy funding the FCF may be increased in future.

Discrimination: justification, 'cost plus'

An employer's need to reduce expenditure, and specifically staffing costs, can constitute a legitimate aim as part of objective justification of indirect discrimination, according to a **recent Court of Appeal decision**. An employee had complained of indirect age discrimination in connection with a reduction in his rate of pay progression, as a result of the policy of austerity in public sector pay.

What does this ruling mean for trustees?

The issue of justifying discrimination on grounds of cost alone/cost plus has arisen before in the pensions context. This is a complex issue: visit www.allenoverly.com/discrimination to read about pensions-related discrimination claims.

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Jason is a Counsel in the Pensions 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 'very confident, very able and very knowledgeable' and that he 'has a lot of experience and he knows his stuff'.

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