

Pensions in Dispute

February 2021

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 (TPO) determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

Disclosure of trustee minutes

TPO has recently rejected a claim for disclosure of trustee minutes: **read the decision**.

Mr N complained that he had transferred benefits to the scheme in 1997 on the understanding that discretionary pension increases would be RPI-linked; that AVC benefits had not been included in his service credit; and that the trustees had failed to provide him with information about the interpretation of the increase rule and his transfer. In a bid to obtain that information, he had made a data subject access request (DSAR) and also argued that some of the information must be provided under the Disclosure Regulations – this included a trustee minute that he said he had seen in 1997.

The RPI/CPI and pensionable service complaints were held to be out of time. On disclosure, the adjudicator considered that the failure to provide the information was maladministration. The trustees responded that they had no record of the minute, nor any details of correspondence with the actuary on the calculation of Mr N's service credit, and that this was consistent with their record-keeping duties.

TPO concluded, contrary to the adjudicator's view, that there was no maladministration. Even if the trustee minute existed, the Disclosure Regulations applied to the trust deed and rules plus 'any documents that supplement or alter' that information. In TPO's view, a minute of a meeting discussing how the trustees might exercise their discretion would not 'supplement or alter' the deed

or rules, so no disclosure obligation arose. TPO did not consider that the trustees could have reached a decision in the 1990s that would have effectively bound them (and their successors) to permanently exercise their discretion in a certain way.

What does this ruling mean for trustees?

This case raises interesting points about trustee disclosure obligations, and how members may request information in support of their complaints. Mr N had sought to obtain information under statutory pensions and data protection regimes; the adjudicator appears to have approached the request for information initially as a matter of trust law and giving reasons for decisions. TPO made no comment on the trustees' record-keeping obligations or their refusal of Mr N's subject access request (there are only limited grounds on which a DSAR can be refused).

IHER: improper consideration

TPO has upheld a complaint about a failure to properly consider an ill-health early retirement (IHER) application: **read the decision**.

Mrs N's employment had been terminated in 2015. Following a settlement agreement, her employer (as the relevant decision-maker under the Local Government Pension Scheme) reconsidered whether to award IHER. This was granted, but she complained that her benefits had not been backdated to her date of dismissal.

The complaint was upheld. Active and deferred member forms had been sent to the occupational health company, with instructions to complete the active member form if Mrs N was eligible from 2015, or the deferred member form if she was eligible from a later date. It was unclear from the report that the medical expert understood what they were being asked to consider, as the report did not address the issue. It was not appropriate to assume that, if the expert considered Mrs N met the conditions in 2015, they would have completed the appropriate form. It was implicit in the settlement agreement that the employer would consider Mrs N's appeal in a proper manner (which it had not done). The failure to comply with the agreement was maladministration.

The employer was directed to reconsider Mrs N's eligibility and obtain an opinion from a new expert on whether the conditions were satisfied in 2015; and to pay arrears plus interest (if Mrs N was eligible from 2015) plus £500 compensation.

What does this ruling mean for trustees?

This case is a reminder to ensure that medical experts are provided with clear instructions, and to seek clarification if it is not clear that they have addressed the necessary question(s).

Pension sharing: delayed implementation

TPO has recently directed an administrator to conduct a loss assessment relating to a transfer, where a pension sharing order (PSO) had not been implemented: **read the decision**.

The administrator had received the PSO in 2010; in 2017, the member contacted it about the PSO after receiving his pre-retirement pack. A few months later he queried a CETV, which was overstated as the PSO had not been implemented. After a change of administrator, the new provider implemented the PSO incorrectly and then issued a new CETV and paid the transfer (plus a later corrective top-up). The member complained about both administrators, and that the value of his transfer had been reduced by the delays.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales. The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2021. This document is for general guidance only and does not constitute advice. | UKS1: 2004091614.1

TPO considered that the first administrator's maladministration had delayed the transfer out, and that by alerting it to the non-implementation of the PSO, the member had taken reasonable steps to attempt to minimise financial loss. The first administrator had agreed to carry out a loss assessment for the transfer; TPO set out the precise method to be used. If the assessment indicated a shortfall in units acquired in the receiving scheme, it was directed to pay an amount to the receiving scheme to make good the shortfall. The administrators had already paid amounts totalling £2,000 for distress and inconvenience (which TPO considered appropriate).

What does this ruling mean for trustees?

Delays and errors in implementing a PSO can create significant problems when benefits are transferred or put into payment. In this case, as well as compensation for distress and inconvenience, the member was potentially entitled to additional compensation for financial loss.

Contact us



Jason Shaw

Counsel – London
Tel +44 203 088 2241
Mob +44 7823 530 809
jason.shaw@allenoverly.com

Jason is a Counsel in the Pensions Litigation group. He specialises in all aspects of pensions disputes, from internal disputes to matters before the Pensions Ombudsman, the Financial Ombudsman Service, the Pensions Regulator, the PPF Ombudsman and the courts. In Chambers & Partners Directory, clients describe Jason as 'very confident, very able and very knowledgeable' and say he 'has a lot of experience and he knows his stuff'.