

Pensions in Dispute

May 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 court decisions and Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

Rectification: words omitted in error

The High Court has ordered rectification of a deed to re-insert words that were omitted in error during the drafting process, affecting rules on pension increases and revaluation: *Iggesund Paperboard (Workington) Ltd v Messenger*.

The application was not contested, and the judge noted that it was 'the clearest possible case for rectification of a pension deed'. However, following communications from the scheme administrator, two members had written to the representative beneficiary to say that they would be materially affected by an order for rectification. The judge noted that, even with regard to what they had said, there was no arguable defence to the claim and it was appropriate for the court to make the order. The members could complain, if they wished, via another route (eg to the Pensions Ombudsman).

Pensions rectification cases are relatively common, as they are the primary way of correcting a drafting error that could have significant financial consequences (such drafting errors cannot be remedied by a simple deed of amendment due to section 67 of the Pensions Act 1995).

The increasing trend for pensions rectification cases to be granted via summary judgment (without a full hearing) has also meant that obvious errors in scheme documents can be remedied more cost-effectively than might have been the case in the past.

In *Iggesund*, there was reference to communications to and from members about the proposed rectification action. As a matter of good practice, trustees should notify members about a proposed rectification action. Typically, trustees will only receive a few member responses, which will be shown to the court, as was the case here. Those responses rarely, if ever, affect the outcome of a rectification action, because the action is concerned with the intention of the parties to the document. If they have provided detailed evidence about their intention, there is little members will be able to add.

The role of the representative beneficiary, acting on behalf of members, is to advance any available arguments against the rectification (eg lack of evidence) or estoppel, if they think there is a reasonable prospect of those arguments succeeding. It is rare that member objections will prevent rectification being granted where the representative beneficiary has considered those objections and shared them with the court but concluded that they do not give rise to a reasonable prospect of defending the claim.

Proof of dates of birth and marriage

The Pensions Ombudsman (TPO) has rejected a complaint from a member about a delay in putting her benefits into payment (**CAS-41310-M3X4**). The scheme had asked for evidence of her date of birth (DOB), her marriage and her spouse's DOB but she did not provide the documents requested.

TPO held that these were key pieces of information, and the administrator had acted correctly and fairly in ensuring it had appropriate evidence before putting the benefits into payment (the evidence relating to her spouse was sought as a survivor's pension could potentially become payable). In response to the fact that the member did not have a birth certificate, the administrator had offered additional flexibility.

What does this ruling mean for trustees?

Here, the failure to provide the paperwork appears to have been (partially) due to the member's unwillingness. However, trustees are likely to encounter situations where members are genuinely unable to provide such documents and would need to exercise appropriate flexibility in such cases, balanced against the need for identity checks to prevent fraud.

Lifestyling: complaint not upheld

TPO has rejected a complaint that information provided on lifestyling was unclear (**CAS-37741-Y7G0**). The member had been sent information about changes to investments, and her ability to opt out of the default lifestyling approach. She did not opt out, but subsequently complained that she had not been given sufficiently clear information and had suffered financial loss.

TPO considered that the information given clearly showed how the lifestyle investment strategies worked, and that if the member was unsure she could have sought further advice or guidance.

What does this ruling mean for trustees?

TPO's view that the onus was on the member to take further advice or guidance is helpful. The determination includes excerpts from the communications.

Pension scams: shorter 'grace period' following Scorpion guidance

In this case (**PO-24554**), a member complained about the due diligence conducted on a 2013 transfer out. The transfer payment was made the

day after the Pensions Regulator (TPR) published its 2013 Scorpion campaign. However, due to an error in the bank account details, the funds were returned and a new payment was made a month later without any further checks being conducted.

Although TPO did not consider that any post-Scorpion enhanced due diligence checks were required before making the second payment, he did state that, in light of the 'evolving regulatory approach', he now considers a period of approximately one month as generally sufficient for a scheme to put in place new procedures following the guidance. This is a shorter 'grace period' than the three months referenced in previous cases. Where a scheme cannot meet the one-month timeframe, TPO expects consideration to be given to temporarily suspending transfers while it makes the necessary arrangements, or to contacting TPR.

What does this ruling mean for trustees?

Complaints about due diligence on historic transfers out are increasing, partly due to the involvement of claims management companies. Trustees and administrators should be mindful of updating procedures promptly in response to changes to scams guidance.

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, including advising clients on 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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