

Pensions in Dispute

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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 cases that have practical implications for schemes. For more information, please contact pensions.team@allenovery.com.

TPO's first decision on Transfer Regulations and overseas investment flag

The Pensions Ombudsman (TPO) has published a helpful first decision involving the overseas investment flag under the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021 (the **Transfer Regulations**): **CAS-93568-H0D0**.

Under the Transfer Regulations, an amber flag is raised where a member asks to transfer to a scheme which includes overseas investments. This means that the member must be referred for MoneyHelper guidance before they can transfer. The interpretation of this requirement has caused issues for schemes, with industry debate over whether a strict interpretation (referring all transfers involving any overseas investment element for guidance) or a more risk-based approach should be taken.

In this case, the trustees took a strict interpretation and referred the member, who had requested a transfer to a scheme offering global funds, to MoneyHelper. The member complained that this caused delay which led to financial loss.

TPO found: (1) whether or not there are overseas investments in the receiving scheme is a decision for the trustees of the transferring scheme to make; (2) the wording of the Transfer Regulations and their intended practical application 'may not be aligned'; and (3) the trustee was entitled to decide

that there were overseas investments in the receiving scheme and 'its literal interpretation of the Transfer Regulations is not unreasonable', therefore there was no maladministration.

On this basis, TPO found that the trustee had not caused an unreasonable delay to the transfer.

What does this ruling mean for schemes?

The decision does not give an answer on what the correct approach for dealing with the overseas investment flag is but will be reassuring to trustees who have adopted a strict interpretation of the requirements. It does not invalidate a more risk-based approach and schemes that have taken that approach may take comfort from the case that TPO will base decisions on the reasonableness of whichever method is used.

TPO not a 'competent court' for enforcing pensions off-setting

The Court of Appeal has ruled that TPO is not a 'competent court' for the purposes of enforcing set-off of pensions: **TPO v CMG Pension Trustees Ltd and CGI IT UK Ltd**.

Section 91 of the Pensions Act 1995 imposes conditions on recouping overpayments from pensions, including that where a member disputes the amount, the trustees must get an 'order of a competent court' to enforce the payment.

In September, in the case of *CMG Pension Trustees Ltd v CGI IT UK Limited*, the High Court found, among other things, that TPO is not a competent court for these purposes. TPO (not a party to the original case) appealed this part of the decision, but the Court of Appeal has agreed with the High Court's findings.

What does this ruling mean for schemes?

In practice, this will make recouping overpayments more difficult for trustees - where a member disputes recoupment, a decision by TPO that recoupment should be allowed will not be enough for enforcement; an order from a 'competent court', such as the county court, will be needed.

Trustee acted reasonably in returning scheme surplus to employer

TPO has found that it was reasonable for a trustee to exercise a discretion to pay a scheme surplus to an employer: **CAS-92093-N4D9**.

In this case, a surplus of around GBP12 million remained on winding up a section of the scheme. The trustee had the power, following consultation with the scheme employer, to use the surplus to increase members' benefits to the extent it considered just and equitable, and then to pay any remaining funds to the employer. The trustee decided not to increase members' benefits and instead to return the full surplus to the employer.

Key factors in the trustee's decision were (i) that until benefits were bought out, the employer had borne all down-side risk; and (ii) the employer had made significant additional contributions to the scheme, which was a key factor in achieving a surplus and securing members' benefits.

A member challenged this decision. His arguments included that the trustee had not acted in members' best interests. TPO dismissed the complaint. He found that the trustee had properly interpreted and complied with the scheme rules; the correct test

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was whether the trustee 'acted to promote the purpose for which the trust was created'; trustees are able to (and may be under a duty to) take account of a sponsoring employer's interests when exercising their powers; the trustee had taken into account all relevant factors and no irrelevant ones; and the decision was reasonable.

What does this ruling mean for schemes?

This decision is helpful for schemes wrestling with how to manage surpluses. It went in the trustee's favour that they appeared to run a good consultation process, with clear communications and explanations of the decisions being taken, which matched up with the trustee's clearly recorded and comprehensive discussions. The power to pay surplus in this case was unambiguous; the situation may be more difficult where the power is less clear-cut, in which case these process points will be even more important.

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