

ALLEN & OVERY

Pensions in Dispute

November 2018

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.

Key updates this quarter

Schemes must equalise GMPs

The High Court has ruled in the [landmark Lloyds case](#) that schemes must equalise scheme benefits for the effects of unequal guaranteed minimum pensions. The ruling affects schemes that were contracted out of the State Earnings-Related Pension Scheme from 17 May 1990 to 5 April 1997. [Click here](#) for more detail on the case, action points and our commentary.

RPI to CPI switch? Depends on your scheme's rules

The recent [Barnardo's case](#) concerned a proposed change to the index to be used for revaluing deferred pensions and increasing pensions in payment. The Supreme Court has underlined again that whether a scheme can change index from RPI to CPI (a cheaper revaluation requirement) depends on the precise wording of the scheme rules. Unfortunately the court did not clarify whether a switch from RPI to CPI would be a detrimental modification under the Pensions Act 1995 (the Court of Appeal commented that it was not, but did not rule on the point). [Click here](#) for our guide to RPI /CPI issues.

Non-financial injustice compensation guidance

The Pensions Ombudsman (TPO) has updated its [guidance on compensation for non-financial injustice](#) caused by maladministration. Compensation is split into five fixed bands ranging from nil in trivial cases to GBP2,000 (or more) in exceptional cases. For more information, [click here](#).

Signposting communications about TPO, TPAS and the ERS

Schemes may update their communications to members to reflect that the Pension Advisory Service's dispute resolution function has moved to TPO and that the Early Resolution Service (ERS) is now live. The ERS can be accessed before the internal dispute resolution procedure (IDRP) if the parties agree. For formal adjudication the IDRP still needs to be completed. Trustees should consider their view on the use of the ERS and inform members appropriately. For more information, [click here](#).

Transfers: TPO expects due diligence to be proportionate and prompt

Last quarter [we reported on a TPO case](#) in which a scheme was criticised for not meeting the industry standard due diligence expected on a pension transfer. Recently TPO has criticised a scheme for conducting too much due diligence.

[In this case](#) the member had requested a transfer of his SIPP funds to his occupational pension scheme, the Universities Superannuation Scheme (USS). Due to a recent wind-up and transfer of the SIPP, the administrator had to wait for a transfer of the funds and

then conduct a reconciliation process, which took three months. The administrator then began its due diligence of the proposed receiving scheme, which took a further four months and included requesting all the scheme rules and certified bank statements.

TPO upheld the complaint about the time taken to complete the transfer, stating that the due diligence undertaken was in excess of the Code of Good Practice on Combating Pension Scams; it was disproportionate to the risk presented by the USS, given that it is a large, well-recognised scheme of which the complainant had been a member for many years. The administrator was

also criticised for not running its due diligence concurrently with the reconciliation process.

TPO directed that the member be awarded GBP500 for non-financial injustice and be compensated for any investment loss resulting from the transfer delay, as the loss was a direct result of the delay caused by the overly cautious and late due diligence process. TPO determined that the transfer should have been made seven days after the reconciliation process was completed.

What does this mean for trustees?

Whilst ensuring that due diligence is thorough and conforms to industry standards, trustees should be mindful that one of the core principles of the [Code of Good Practice on Combating Pension Scams](#) is that due diligence is proportionate to the risk presented by the receiving scheme.

Given the risk of delay to transfer requests while schemes work out their approach to equalising GMPs, trustees should ensure that member communications on the issue are clear, and they should promptly start due diligence and any other process which can be actioned. [Click here](#) for our blog post on this case.

An employer's duty to inform employees about their pension rights

[Last quarter](#) we reported on the trustee duty to inform members of their pension rights. This quarter TPO held that employers also have a duty to consider the information they give vulnerable employees or their family about their pension rights.

[In this case](#), the employee, on sick leave suffering with cancer, applied for an ill-health early retirement pension to take effect after his notice period. He was told that his wife would receive a more generous pension benefit if he died in retirement and to contact the employer to waive his notice period if his condition worsened. The employee's wife later followed this advice. The detail of the call was disputed but TPO held that on the balance of probabilities she had told the employer about her husband's condition and asked to access some of the pension. She was told that it was not possible to do this. The employee died shortly afterwards and his wife brought a complaint against the employer for not waiving his notice period.

TPO upheld the complaint, stating that the wife was not at fault for not using the correct technical terminology about drawing the pension and, given the circumstances,

the employer should have enquired whether the employee wished to access the full pension immediately. TPO recommended that the wife should be awarded GBP500 for non-financial injustice and directed that she be paid the difference in benefits had the employee's service been terminated 48 hours after the call (plus interest), but offsetting the employee's additional pre-death earnings.

What does this mean for trustees?

This decision emphasises a consistent message in TPO cases, whether the respondent is the trustee or the employer, that communication with vulnerable members must be appropriate to their circumstances, and must allow members to make informed decisions about their pension benefits. In cases that affect both the employer and the trustees (such as ill-health cases), both parties need to understand the member's/employee's situation and provide correct and appropriate information. Good communication channels between the employer and trustees are key to ensuring that this happens.

[Click here](#) for our blog post on this case.

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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. Jason is ranked in Chambers & Partners Directory in the field of Pensions Litigation.

