

ALLEN & OVERY

Pensions in Dispute

August 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.

Serious ill health and trustee responsibilities

When a member requests serious ill-health commutation, it is well-established that the trustees need to act with urgency to allow access to benefits during the member's lifetime. The Pensions Ombudsman (TPO) is unsympathetic towards trustees who have failed to make this possible, even if the timescale from notification to death is short.

In such serious ill-health cases, information provided must be correct as well as timely. In a recent [case](#), the administrator sent a terminally-ill member information about his benefits and the option to take a lump sum if he could provide the requisite evidence that he had less than 12 months to live. The member died four months later without taking benefits and, therefore, the entitlement was to (less generous) death in deferment benefits.

TPO upheld the wife's claim that her husband should receive the benefits set out in the letter. The trustees had been put on notice that the member was terminally ill, but the information sent to him did not set out the conditions on which the benefits were payable, as required by law.

The failure to highlight that the benefit options were dependent on him accessing them in his lifetime amounted to maladministration and breach of the trustees' fiduciary duty; they had not provided the member with relevant information so that he could make an informed decision about his benefit options under the scheme.

The trustees were ordered to pay the estate the sum it would have received plus interest, and the spouse the pension that she would have received had the member taken the benefit in his lifetime. The trustees were also directed to pay £500 for the distress and inconvenience caused.

What does this ruling mean for trustees?

It is important to have procedures in place to ensure prompt communications with terminally-ill members and that those communications are appropriate to the member's circumstances (including the fact that the member will be preoccupied with his or her health). TPO also expects trustees to ensure that important information is received promptly and that the member can understand its significance.

A separate issue, which is often missed or not considered in advance, concerns the treatment of the spouse's pension in cases where the member is eligible for, and takes, serious ill-health commutation. The spouse's pension, as well as the calculation of the commutation itself, may not be expressly provided for in scheme rules, so trustees may have to exercise discretion about eligibility for, and the calculation of, any spouse pension. It is worth understanding what the trustees' options are in advance of a serious ill-health commutation case.

Key Quotes

A [reminder](#) of TPO's expectations on giving reasons (the particular context was a death benefit decision): *'Documented reasons need not themselves be lengthy but should be sufficient to convey to the reader an understanding of the factors which have been given some weight. It may also be appropriate to record why some factors have been discounted. The reasons should be sufficient to enable an aggrieved party to know whether there are grounds to challenge the decision.'*



Pension transfer due diligence – what is expected of trustees?

A member's transfer to a suspected pension scam scheme hit the headlines recently when the Police Pension Scheme was directed to reinstate the member's benefits and pay him £1,000 compensation.

The complainant only realised a year after the transfer was made that he had transferred to an occupational, rather than a personal, pension scheme and that he had signed up to high-risk investments.

TPO found that the scheme's due diligence was not in line with industry practice at the time and that it had ignored red flags, such as the scheme sponsor being a dormant company registered at an address on the other side of the country from the member. The authority had also failed to provide the Regulator's warning materials to the member (a link to these materials on the scheme website was not sufficient).

On the basis of these failings, TPO [ruled](#) that the authority could not rely on the statutory discharge provided under section 99(1) of the Pension Schemes Act 1993. Read our [blog post](#) for more on this case.

What does this ruling mean for trustees?

This case highlights the importance of ensuring that transfer diligence and procedures are consistent and in line with current best practice, as set out in the recently updated [Code on Combating Pension Scams](#). When new guidance is published, TPO has noted in previous cases that trustees will need time to consider and update practices as appropriate but that this should take no longer than a few months.

The updated code 'strongly suggests' that a direct fact-finding call from the trustee/administrator early in the process can help identify cases of greater concern – a step that, if taken in this case, could have flagged hidden issues to the trustees.

Watch this space

- TPO noted in its [annual report and accounts for 2017/18](#) that:
 - updated guidance is being drafted outlining fixed levels of awards for non-financial injustice (ranging from £500 to £2,000) and the circumstances in which these are likely to be made; and
 - TPO is considering how to deal with overpayment cases following [Burgess v Bic](#). In that case, the High Court commented that recoupment is not subject to the six-year limitation period, and suggested that if there is a dispute as to the amount of the overpayment ordered by TPO, an application to the County Court would have to be made to enforce the determination. To read more about recovery of overpaid pensions, visit our [Pensions in Dispute website](#).
- We are advising the trustee of the Lloyds Banking Group pension schemes on a High Court case heard in July, about whether GMP equalisation is required and, if so, how it should be achieved. Our [blog post](#) summarises the case and what schemes can do now to be ready if the Court rules that GMP equalisation is required.

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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.

