

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

Guidance on discretionary increases

With the current cost-of-living situation, discretionary increases are becoming a hot topic. The Pensions Ombudsman (TPO) recently rejected a complaint that a scheme had not awarded discretionary increases. The decision gives some guidance on factors to take into account when considering these awards: **CAS-33253-W9R0**.

In this case, the member's benefits were accrued before legislative requirements to increase pensions were introduced. The rules gave the trustee a discretionary power to award annual bonuses and/or increase pensions where they considered it appropriate 'having regard to the increase in the cost of living' and after obtaining actuarial advice. The member received bonus forecasts and communications referring to discretionary increases.

TPO found that the member was not entitled to bonuses or increases: the bonus forecasts were not guarantees; the trustee had to consider the impact that paying bonuses would have on the ongoing solvency of the scheme; and the trustee's main responsibility was to meet the funding requirement of its liabilities, such as paying pensions, not award discretionary increases which are 'ordinarily paid out of a surplus' (the scheme was in deficit).

What does this ruling mean for trustees?

A number of schemes are wrestling with whether they could/should be trying to give members a helping hand with the increased cost of living

through a discretionary bump to pensions. This decision highlights the factors schemes should be giving priority to when taking these decisions: scheme solvency and the ability to continue to pay the pensions due.

Rectification: improve your chances of correcting mistakes

The long-standing and complex nature of pension scheme documents means that drafting mistakes do happen. But there are ways you can mitigate the impact. The High Court has provided some helpful guidance for trustees on making a successful application for rectification where a mistake in scheme rules has been identified: ***Viavi Solutions UK Ltd v Viavi Solutions Pension Trustee UK Ltd***.

In *Viavi*, it was successfully argued that underpins were added in to the scheme's pension increase rules in error and that rectification of that mistake should be granted.

The judge found that the facts in this case 'amply reached the relevant evidential threshold' for rectification. The evidence taken into account included: (a) there was no record of an instruction to the lawyer updating the rules to increase the benefits to members; (b) there was no evidence that there was an intention to improve benefits to members by adding the underpins; (c) very shortly after the change was made, emails were sent

identifying it as an error and a trustee meeting recorded that the drafting was incorrect; (d) efforts were made to correct the error, including an amending page purporting to correct the relevant rule being signed by the trustees and a deed of rectification – while these steps were deficient for various reasons, they provided ‘the best possible evidence of the intention of both the company and the trustees’; and (e) the scheme has been implemented on the basis that there were no underpins.

What does this ruling mean for trustees?

To protect your scheme from unintended consequences where rule changes are being made, make sure instructions are recorded carefully to demonstrate what the intention behind the amendments was at the time. Those records need to be retained, since errors may not become apparent until some years down the line. Where a mistake is identified or suspected, trustees should ensure they act quickly and keep a good paper trail of thinking and discussions, to give the best chance of a successful rectification, if needed.

Statement on transfer timings not a contractual agreement

Timings of transfers continue to be a hotbed of complaints, and trustees must be careful with communications around this. TPO recently considered a case where a member claimed that a communication sent to him after requesting a transfer, stating ‘*Transfers can take up to 3 weeks*’, created a contractual agreement to complete the transaction within that time: **CAS-50810-B4J9**.

TPO did not agree that there was a contractual agreement. A contract needs an offer, acceptance, consideration, intention to create legal relations, and certainty of terms. TPO found that the statement was only a guide to typical timescales, not a guarantee; it did not give sufficient certainty of terms.

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TPO also found that there was no intention to create legal relations because the provider was only one of a number of parties to the transaction and would not have been in a position to guarantee the performance of external parties to the transfer.

What does this ruling mean for trustees?

There is some helpful commentary here for schemes on when statements they make will be seen as binding. Although the statement in this case was fairly firm (‘transfers can take up to 3 weeks’), TPO did not find that it was sufficiently certain to form a guarantee, and in any case the other requirements for a contractual relationship were not satisfied. The comments on not intending to create legal relations where external parties have influence on the outcome could be useful in a number of contexts where schemes depend on other parties to complete transactions.

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