Sackers

Pensions & Investment Litigation Briefing

December 2017

Sackers' Pensions & Investment Litigation team reviews recent case law and examines the practical lessons for trustees and employers

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Abbreviations

DB: Defined benefit
DC: Defined contribution
DPO: Deputy Pensions Ombudsman
DWP: Department for Work and Pensions
FCA: Financial Conduct Authority
HMT: HM Treasury
IDR: Internal dispute resolution
SFO: Serious Fraud Office
TPAS: The Pensions Advisory Service
TPO: The Pensions Ombudsman
TPR: The Pensions Regulator

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Overview

"2017 has been a busy year for the providers of pensions advice and guidance. Among these, TPAS continues to go from strength to strength, with more calls on its services than ever before. Its annual review released in September shows just how popular the service has become – we look at some of the stats on page 3.

In our last briefing of 2017, we recap on the general concept of legal privilege which came under the spotlight in the High Court case of SFO v ENRC. We consider what the implications might be for investigations by TPR, and offer some practical tips on maintaining privilege.

TPO also continues to be busy with a range of complaints. Transfers remain a hot topic and we look at one of the latest decisions – a complaint from a pension scheme member who did not want to take appropriate independent financial advice before transferring their benefits.

We wrap up with another complaint – this one regarding an exit charge which was applied when a DC member sought to take his benefits early.

Finally, looking ahead to what 2018 has in store, upcoming cases include BA's appeal regarding the award of discretionary pension increases in 2013, and the Lloyds case on the legality of unequal GMPs.

With best wishes for Christmas and the New Year."

Arshad Khan
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In this issue

TPAS annual review

TPAS attracts more enquiries than ever

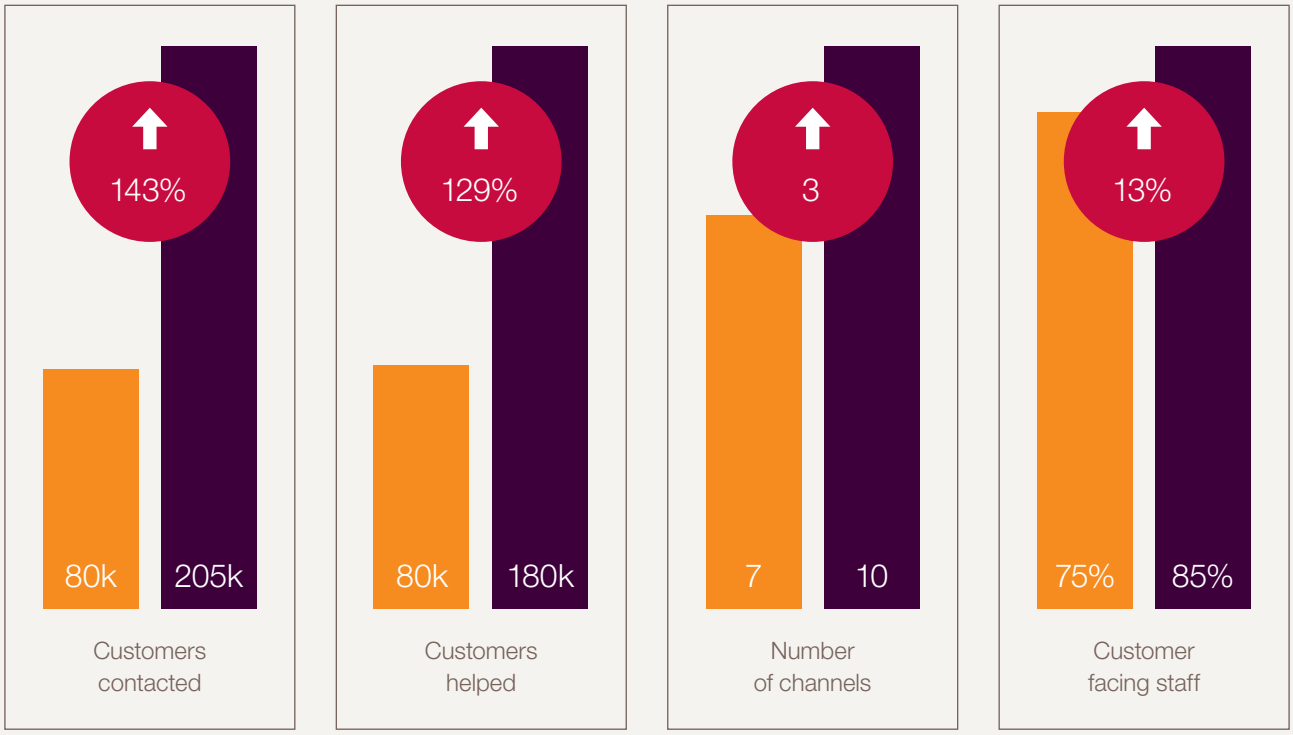
The facts and figures

TPAS provides pensions advice and guidance to many individuals. Its latest annual review for 2016-17 (published on 19 September 2017) shows:

- a 9% increase in customers to 205,400 (from 188,500 in 2015/16)
- 3.3 million website visits over the course of the year.

TPAS provides assistance through a range of channels (including telephone and webchat helplines, and online and written queries). It has grown steadily over the last three years – the chart below highlights its development.

TPAS Service: 3-year journey



Source: TPAS annual review 2016-17

The future of the TPAS service

The advisory function of TPAS is set to form part of the new single financial guidance body, alongside Pension Wise and the Money Advice Service. The combined guidance body will be established by the Financial Guidance and Claims Bill, which is currently making its way through Parliament.

Meanwhile, TPAS' dispute resolution process is due to come within TPO's remit. We understand that the move is currently the subject of discussions with pensions industry representatives, TPAS service users and pension providers.

Merger of the dispute function with TPO is expected to take place before the introduction of the single financial guidance body, which DWP / HMT have said will be "after autumn 2018".

Legal professional privilege

Legal professional privilege is an important concept, which protects lawyers' clients against having to disclose confidential communications or documents to third parties or to the court. While it has always been a key feature of the client-lawyer relationship, the issue came to the fore in 2017 in the case of SFO v ENRC.[1]

Legal professional privilege

The concept of legal professional privilege in England and Wales can be divided into two main categories: legal advice privilege and litigation privilege. The former applies to the general relationship between a lawyer and their client, while the latter is relevant to litigation and its contemplation which, in the pensions context, could include investigations by TPR and IDR proceedings.

1

Legal advice privilege

Legal advice privilege applies to all confidential communications (both written and oral) and other documents between a lawyer and their client where the main purpose of the communication is for the giving or receiving of legal advice.

2

Litigation privilege

By contrast, litigation privilege applies to all confidential communications, either between a client and their lawyer, or between either of them and a third party:

- where there is existing litigation or it is in reasonable contemplation, and
- the communication was created for the dominant purpose of obtaining advice or evidence in relation to (the contemplated) litigation.

In this context, litigation which is "contemplated" must be more than a "mere possibility".

Losing privilege

Confidentiality is an essential pre-condition for both types of privilege. As a general rule, if a communication ceases to be confidential, it will also cease to be privileged.

1 The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd (8 May 2017)

Legal professional privilege cont.

SFO v ENRC

Earlier this year, the High Court scrutinised whether litigation and legal advice privilege apply to certain documents. The case concerned a criminal investigation by the SFO, in which the SFO sought a declaration that documents prepared by solicitors and forensic accountants as part of ENRC's own internal investigation should not be covered by privilege.

Ruling in favour of the SFO, the High Court found that litigation privilege could only apply if ENRC anticipated actual criminal prosecution. This was because the rules on litigation privilege require litigation to be in existence or in reasonable contemplation. This was not found to be the case here. Nor did legal advice privilege apply to notes taken by solicitors of interviews with factual witnesses, even though the purpose was to advise ENRC.

Many commentators have found this decision surprising, given the extent to which it limits privilege and its potentially far reaching consequences for corporate internal investigations. The Court of Appeal has given leave to appeal, so we await further developments with interest.

Potential impact for pension schemes

In the pensions sphere, litigation privilege can arise in regulatory investigations by TPR. The question of when litigation privilege arises in this context will be a matter of fact in each case; as yet, it is untested by the courts. The key will be when adversarial proceedings (as opposed to an investigation or enquiry from TPR) are considered to be in reasonable contemplation.

Maintaining privilege – a key issue

Who is the client?

Care must be taken to ensure that legal advice is requested by and provided to authorised recipients. Generally, when legal advice is provided to a company (including pension scheme trustee companies), only certain people within the company will be the "client" for the purposes of privilege. Providing advice to other individuals within that company can mean that legal advice privilege is lost.

Pension transfers

The subject of pension transfers is one which continues to keep TPO's office busy. Whether because of delays in the process that result in the loss of investment returns in DC schemes, or where disagreements arise as to the nature of the receiving scheme (ie whether or not it is a legitimate arrangement to which a transfer can be validly made), transfers give rise to many potential areas of dispute.

Here we look at a recent decision regarding a complaint from a member whose request to transfer was refused, after they refused to seek appropriate independent financial advice.

Background

A member wishing to transfer safeguarded (generally DB) benefits of more than £30,000 to a DC arrangement must take appropriate financial advice from an FCA authorised adviser in order to access flexible (generally DC) benefits.

Mrs S (PO-18181) complained that the requirement to obtain financial advice was disproportionately expensive, given her "relatively small" benefits of £44,000, which had a Guaranteed Annuity Rate. She also commented that she had previously transferred pensions with other providers without having to get advice, and that as she was now unwell with liver cancer, she did not have "time to chase what she feels is her own money". Mrs S said that she would be happy to sign a form waiving the liability of the pension provider, Royal London.

Royal London explained that they were unable to waive the requirement for Mrs S to obtain financial advice, as this is a legal requirement where the pension involved is worth more than £30,000. They suggested that given Mrs S's state of health, she may wish to consider applying for a serious ill-health pension, as she may be entitled to receive her pension as a lump sum.

Decision: No waiver of the financial advice requirement

While the DPO was sympathetic to Mrs S's personal circumstances, there was nothing which Royal London or the DPO could do to waive the legal obligation on the member to obtain independent financial advice. As Royal London had not acted in a way which could constitute maladministration, the complaint was not upheld.

Sackers' verdict

The requirement for pension scheme members to obtain appropriate independent advice was introduced as a safeguard when the pension freedoms were launched in 2015. The aim is to protect members who may not always be aware of the value of their DB benefits and any guarantees on DC pots.

Given that members will generally need to pay for their own financial advice, it is not uncommon for members to push back on this. However, as Mrs S found, when the requirement to obtain advice applies, there is no leeway to waive it in any circumstances.

Early exit charges

With the spotlight on governance and transparency in DC schemes, it was only a matter of time before complaints concerning charges began to emerge.

Background

Mr N (PO-14441) complained about an early exit charge that was applied when he sought to transfer his benefits out of the Talisman Group Pension Plan (the Plan) more than five years before his chosen retirement date.

The Plan's application form referred to "Policy terms and conditions" being available on request. The terms themselves provided that where benefits are taken early, they may be reduced "by an amount determined by the Actuary". Mr N was given a Plan key features document which included warnings that transfers before a member's selected retirement date could mean they do not get best value; that charges may increase; and that taking benefits early may mean a reduction in the Plan's value.

As Mr N sought to take his benefits early, Royal London informed him of the applicable exit charge. Although this was incorrect at first, the right amount was confirmed and Mr N accepted a goodwill payment from Royal London for the error. Mr N was informed that the charge took account of factors such as the term to retirement, commission taken at the outset by his financial adviser, and when the last premium was paid.

Mr N complained that he had not received a copy of the terms, and that the terms relied on were unfair and unenforceable under the Unfair Terms in Consumer Contracts Regulations 1994 (UTCCR).

Decision: exit charge not unfair

TPO rejected the complaint. While there was no evidence that Mr N had been provided with a copy of the policy, the main terms had been brought to his attention in the key features document. He was therefore on notice that there would be charges for early redemption of the policy.

The fact that the exit charge was stated as being calculated on the advice of the Plan Actuary did not make it unfair simply because no pre-estimate or specific calculation method was given. TPO noted that it would be difficult to set out an actuarial method "in any meaningful level of detail or to make it comprehensible to a consumer". Similarly, the UCCTR does not make exit charges wrong, but states that if a charge is disproportionate, it may be unfair. Although the exit charge of £63,219 was a significant proportion of the fund value (£258,469), it was "not clearly excessive in the sense of out of proportion to the early exit". No exit charge would have applied if the transfer was within five years of Mr N's selected retirement date.

TPO noted that Royal London's exit charge is now a maximum of 1% for policyholders aged over 55 (in line with legal requirements).

Sackers' verdict

New rules, such as the exit charge cap referred to by TPO, have shone a light on costs, charges and transparency in DC schemes. Trustees need to make sure they are managing their DC scheme in accordance with any applicable restrictions which may include:

- a default arrangement charge cap of 0.75% (applied across a "charges year")
- a ban on consultancy charges
- a ban on member-borne commissions.

Costs and charges should now be a standing item on trustee agendas, to ensure not only that a scheme remains compliant with the legislation but that it remains good value for members.

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Contact

Sackers' market leading Pensions & Investment Litigation team is consistently ranked in the top tier by both Chambers UK and the Legal 500. Sackers is experienced in handling cases before the Pensions Regulator, High Court and Pensions Ombudsman, with Chambers UK 2018 commenting that "They provide a first-class service, they are a great firm to work with and they can build relationships".

Sackers is the UK's leading commercial law firm for pension scheme trustees, employers and providers. Over 50 lawyers focus on pensions and its related areas. For more information on any of the articles in this briefing, please get in touch with Katherine or any of the team below, or your usual Sackers' contact.

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Recent publications

For more information on recent developments, see our:

- Quarterly briefing (September 2017)
- Finance & investment briefing (September 2017)
- DC briefing (August 2017)
- checklist on getting ready for the GDPR (July 2017)

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