

Pensions & Investment Litigation Briefing

September 2018

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
D&I: Distress and inconvenience
DPO: Deputy Pensions Ombudsman
DWP: Department for Work and Pensions
IDRP: Internal dispute resolution procedure
QROPS: Qualifying Recognised Overseas Pension Scheme
SIPP: Self-invested personal pension
TPAS: The Pensions Advisory Service
TPO: The Pensions Ombudsman
TPR: The Pensions Regulator

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Overview

“The number of complaints coming across the Pensions Ombudsman’s desk continues to rise, as the stats in this year’s annual report show. Transfers take top spot this time around as the most popular subject matter for a complaint, replacing pension scams which topped the bill in 2016/17.

TPO is also busy assimilating the disputes arm of TPAS under its control, following its transfer in March this year. We look at these and other recent developments on page 3.

Meanwhile, TPR is not resting on its laurels, or waiting for the outcome of the present DWP consultation on enhancing its powers, before taking action against employers and trustees. Nor has it been shy to use its powers to name and shame those who fail to meet their compliance obligations. On pages 4-5, we examine some first time uses of TPR’s existing powers, and look at what might lie ahead.

If you missed our June seminar, “Clearer, quicker, tougher... Why TPR’s new mantra matters to you”, you can catch up with the [webinar](#) on our website.

The trend for higher awards by TPO for “distress and inconvenience” seems set to continue. On page 6, we recap the circumstances for making these awards, and review some of the higher awards made recently.

We round off this edition with a look at a recent TPO decision on an old favourite subject – trustees giving reasons for their decisions.”



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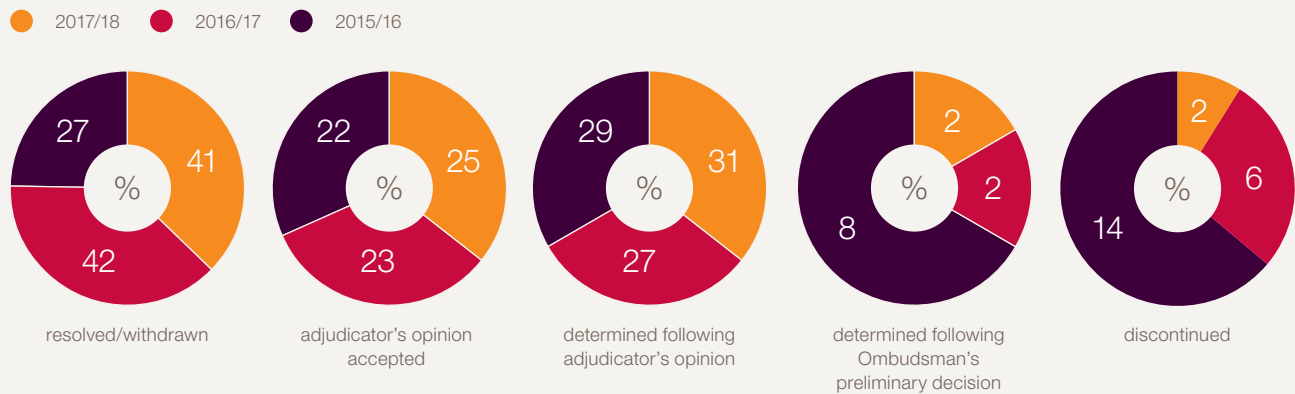
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TPO's caseload

In 2017/18, TPO continued to be busy, with a 26% increase in the number of cases accepted for investigation.

Decision process

Almost 70% of cases were concluded without an Ombudsman's intervention (in other words, they were resolved, or concluded following acceptance of an adjudicator's opinion). Just 2% were dealt with using the formal preliminary decision process. Over the same period, average timescales for completing investigations were halved to five months.



Subject matter of new investigations (top 10)

In terms of new investigations, complaints relating to transfers have taken top spot this year.



Source: The Pension Ombudsman: Annual Report and Accounts 2017/18

One of the main aims of Anthony Arter, the Pensions Ombudsman, has been to “shorten and simplify the customer journey, while maintaining quality and reaching the right outcome”. Part of this has been the integration of the dispute resolution work previously carried out by TPAS into TPO. This move was made in March 2018, and included the transfer of the TPAS dispute resolution team and volunteer network which, at the point of transfer, was over 300 advisers. Customers can now access all pension dispute resolution, previously handled by two services (whether pre- or post-IDRP), at TPO.

Clearer, quicker, tougher: TPR's mantra matters

Even before the DWP published its recent consultation on developing “a stronger Pensions Regulator”, it was becoming increasingly apparent that TPR means what it says with its “clearer, quicker, tougher” mantra.

A work in progress

TPR had already upped its game in 2017/18. Its latest [annual report](#) notes a 92% increase in pro-active engagement, with TPR engaging with the schemes “of the greatest concern” to it before their valuations, working with them “to ensure an appropriate outcome”. TPR says that employers are now clearer about what it expects and, as a result, issues get resolved more quickly.








TPR has exercised its existing powers more than ever before, issuing 77 fines for issues of non-compliance with the scheme return, and 218 for failure to comply with the requirements of the DC chair's statement, among other penalties.

While TPR's work on DB schemes has been under the spotlight, it is keen to raise awareness of its full remit. This includes the regulation of DC schemes, the authorisation and supervision of DC master trusts, ensuring public service schemes are well run, fighting scams, and delivering automatic enrolment.

TPR has also clarified its expectations where it formally requests information under its investigation powers, adding its [monetary penalties policy](#) to its suite of strategy and policy documents, and enforcing against those who fail to provide the information requested.

A first time for everything

In 2017/18, TPR used several powers for the first time. These include:

-  Using its powers to set scheme liabilities and deficit repair contributions
-  Successfully prosecuting 11 people who failed to comply with TPR's information-gathering powers
-  Four fines for failure to produce audited accounts
-  Prosecution of employers for wilful non-compliance with their auto-enrolment duties
-  Prosecution of an employer for providing TPR with false and misleading information in relation to auto-enrolment compliance
-  Carrying out spot checks on employers
-  The first use of a court order to order scammers to repay money to their victims

Clearer, quicker, tougher: TPR's mantra matters cont.

What does the future hold?

The DWP is [consulting](#) on new powers for TPR and seeks views on proposals in three key areas:

1

Increasing TPR's and trustees' access to timely information to allow greater corporate oversight

2

Extending the sanctions regime to deter wrongdoing and to punish it when necessary

3

Improving TPR's existing anti-avoidance powers

The Government aims to improve TPR's oversight of corporate transactions by broadening the current notifiable events regime and introducing a new requirement for sponsors to produce a "declaration of intent" (to be addressed to the scheme's trustees and shared with TPR) prior to certain business transactions.

The DWP also proposes extending the existing penalty regime to include a new power for TPR to impose a civil penalty of up to £1 million for serious breaches, and new criminal offences to punish wilful or grossly reckless behaviour in relation to a DB scheme.

If the radical overhaul of TPR's powers proposed in the consultation is implemented in its current form, it will undoubtedly raise the stakes considerably for trustees and employers.

Scheme funding in the frame

The vast majority of schemes are unlikely to experience first-hand the use of TPR's more draconian new powers in the years ahead. However, one area where they may feel the heat is in relation to scheme funding.

TPR has made no secret of the fact that it wants to reduce the total deficit of around £500 billion of DB scheme liabilities, so we can expect to see more activity in the area of scheme funding and recovery plans. But the watchdog's success in exercising its own scheme funding powers may be limited, at least until the publication of strengthened guidance – a formal consultation on TPR's revised DB Funding Code of Practice is due in 2019.

The trustees' role in scheme funding is also likely to come under increased scrutiny, with more requests to disclose advice they have been given, as well as minutes of meetings and correspondence with the employer. Should it be necessary, TPR has a power (that it can easily use) to force trustees to disclose this material.

While this sort of intervention might not always be welcomed, it is here to stay, and trustees will have to face up to the new reality and prepare themselves. A robust paper trail that records decisions, together with the factors taken into account and a brief summary of the rationale for each decision, will be a very good starting point.

Getting ready for the new regime

TPR's resources, and its ability and appetite to use its new powers, will be crucial in determining its ultimate effectiveness. As outlined in its [corporate plan for 2018-2021](#), TPR intends to spend £4.3 million more in 2018/19 than in 2017/18 (an increase of 5.2%). And in 2017/18, it filled some 241 posts. This ramping up of resources should help it clamp down on sponsoring employers who are not taking their duties towards their pension schemes seriously, as well as launch a new anti-scams campaign to help prevent savers from being ripped-off.

At the same time, TPR will be working with trustees to improve scheme governance.

Compensation for non-financial injustice

TPO has the power to compensate pension scheme members and beneficiaries for non-financial injustice. Such payments are commonly referred to as awards for “distress and inconvenience”.



What is non-financial injustice?

TPO defines [non-financial injustice](#) as:

- “inconvenience”, “time and trouble” or “time and bother” suffered by an applicant. This refers to the time spent sorting out maladministration endured, and the effort of having to pursue any complaint
- “distress”, such as concern, anxiety, anger, disappointment, embarrassment or loss of expectation that an applicant may experience. This can range from mild irritation to (exceptionally) anxiety requiring medical treatment.



How much is TPO likely to award?

TPO’s starting point for D&I awards is £500. Where awards of between £1,000 and £2,000 would once have been considered exceptional, they are becoming more routine. Awards of over £2,000 may be made in exceptional cases.

In its latest [annual report](#), TPO “considers that an increase to the upper limit for non-exceptional awards to £2,000 is appropriate. This ties in with our experience, which suggests that the higher end of the ‘standard’ range is now in the region of £1,750 – £2,000.

October 2017
£2,750



In [Smith v Sheffield Teaching Hospitals NHS Foundation Trust](#), the High Court allowed an appeal against an award by the DPO of £500, ultimately awarding £2,750 on the grounds that there had been a chain of inaccurate estimates, each constituting maladministration, with the number of instances contributing to the likely level of distress.

January 2018
£2,000



[Mrs Y](#) lost the opportunity to transfer her benefits to a QROPS because of lengthy delays, suffered a wrong which could not be righted, and “sustained a serious loss of expectation [...] as a consequence of the maladministration”. She was awarded £2,000 for D&I.

March 2018
£2,500



In March 2018, [Ms S](#) had her award for D&I increased by TPO to £2,500 (from £1,500), for the “very significant” D&I experienced in connection with her application for an ill-health pension. TPO found that the multiple delays and repeated failures by the employer / administering authority, and scheme administrator to respond in a timely manner were “inexcusable”, as was the “completely unprofessional way in which her application was dealt with over many years”.

June 2018
£2,000 (x3)



TPO made an award to three daughters in connection with the exercise of the trustees’ discretion in relation to death benefits due under the [Simply Tiles Ltd Directors’ Pension Scheme](#). In that case, “inordinate” delays and failure by the trustees to have robust processes in place led TPO to make an award of £6,000 (divided equally between the daughters), in recognition of the exceptional D&I suffered.



TPO guidance

TPO notes in its annual report that it is in the process of drafting guidance outlining fixed levels of awards (including those falling within the £500 to £2,000 range) and in which circumstances these are likely to be made.

Discretions: giving reasons for a death benefit decision

TPO recently found a SIPP administrator (ie the trustee) guilty of maladministration, for failing to provide reasons as to the way in which it had exercised its discretion.

Background



Dr G ([PO-18953](#)) complained about a decision by the SIPP administrator not to award her any benefits from the SIPP of her late partner, Mr T. This was in fact a further complaint to TPO, the administrator having been asked to reconsider its initial decision in 2016.

Under the SIPP's rules, Dr G fell within the category of potential recipients for a dependant's pension, as she had been financially interdependent with Mr T at the time of his death. As someone with an interest in Mr T's estate, she was also an "Eligible Recipient" in relation to the lump sum death benefit due. However, the SIPP administrator decided not to secure a dependant's pension for Dr G, and said that Mr T's lump sum should be paid to his estate.

Decision



Although the administrator had reconsidered its initial decision, and had fully detailed the circumstances relevant to the decision in relation to the dependant's pension and the death benefit lump sum under the SIPP, TPO's adjudicator found the decision to be "incomplete". This was because the administrator had not explained its reasons or rationale, and there was "no causative link between the circumstances and conclusion".

TPO agreed, finding the absence of any rationale "problematic". While the administrator had set out the factors it had taken into consideration in reaching its decision, TPO concluded that "the absence of any documented reasons to support a decision" indicated that "there were in fact no supportable reasons for the decision".

He went on to note that while documented reasons need not be lengthy, they "should be sufficient to convey to the reader an understanding of the factors which have been given some weight". He also noted that it may be appropriate to record why some factors have been discounted. By not providing reasons to support its conclusions, the administrator had failed to carry out a complete decision-making exercise.

Sackers' verdict



When a decision is taken by trustees which affects a pension scheme member or potential beneficiary under the scheme, that person is entitled, in broad terms, to understand the basis for the decision. TPO's office has long held the view, as reiterated in this case, that this means the "reasons should be sufficient to enable an aggrieved party to know whether there are grounds to challenge the decision".

Trustees should take care when recording deliberations and decisions, to ensure that the level of detail is appropriate. Any communication issued to a member or beneficiary about a decision concerning them, and the reasons for it, should be consistent with the underlying record of the decision-making process. This helps to ensure there is no discrepancy which could lead to undue scrutiny of the trustees' decision-making process.

Contact

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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 Peter or any of the team below, or your usual Sackers' contact.



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