Sackers

# Pensions & Investment Litigation Briefing

## September 2017

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

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## Abbreviations

**CSP:** Civil Service Pensions
**DB:** Defined benefit
**DC:** Defined contribution
**DP:** Determinations Panel
**DPO:** Deputy Pensions Ombudsman
**FOS:** Financial Ombudsman Service
**PPF:** Pension Protection Fund
**TPAS:** The Pensions Advisory Service
**TPO:** The Pensions Ombudsman
**TPR:** The Pensions Regulator
**TPS:** Teachers' Pension Scheme

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## Overview

"The Pensions Ombudsman continues to be busy, as the stats in his latest annual report show. Although there is some consistency in the types of dispute that are most common year on year, there has been some movement in the top 10. Complaints on pension scams topped the charts last year but only take third place this time around, while "failure to provide information or act on instructions" now takes top spot. We take a look at these trends on page 3.

And TPO is set to get even busier. We understand that when the three financial guidance bodies (TPAS, Pension Wise and the Money Advice Service) are combined into one ("no earlier" than autumn 2018), TPO will take on the dispute resolution aspect of TPAS' work. The transition is in the process of being worked out between TPAS and TPO.

Meanwhile, TPR continues to show signs that it is toughening its approach in all areas, with the first ever use of two of its powers in 2016/17 – see page 7 for details.

We take a detailed look on page 4 at the High Court case of Denning v Greenhalgh, in which the court looked at the circumstances in which a professional adviser owes a duty to review historic advice and transactions entered into by their client.

We also take a look at a couple of recent TPO decisions regarding overpayments. In the first, the member unusually made out a successful defence to the repayment request on the grounds of change of position and estoppel. In the second, the member successfully resisted part of the overpayment on grounds of limitation.

For more on overpayments, including an overview of the general principles that apply, please see our briefing on recent developments in overpayments.

Finally, in a whistle-stop tour of the latest news, we consider the likely increase in standard compensation awards for distress and inconvenience."

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## In this issue

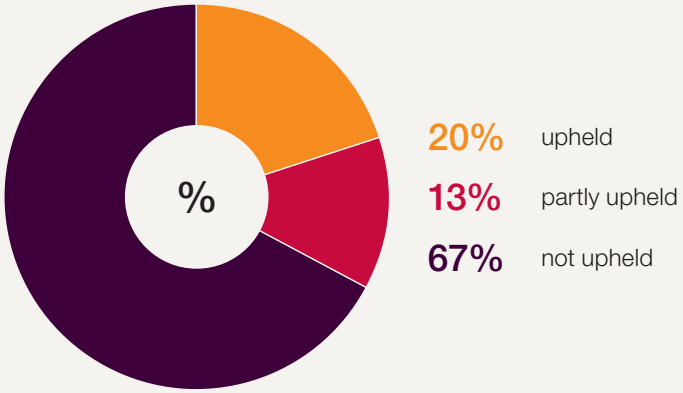
# The Pensions Ombudsman's caseload

In 2016/17, the office of the Pensions Ombudsman (and PPF Ombudsman) handled some 6,121 enquiries – up yet again on the previous year – an increase of 22%.

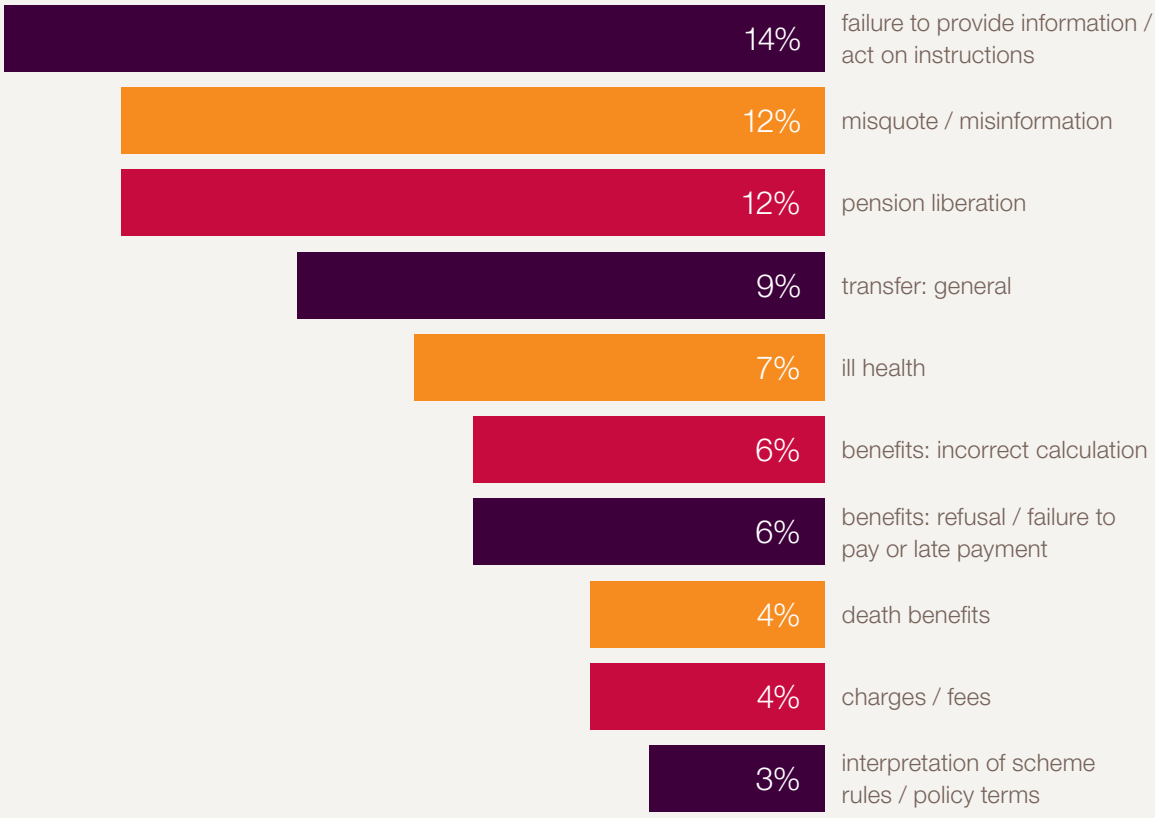
Around 70% of enquiries are now received online, since the introduction in 2016 of TPO's new online facility for making complaints.

## Outcome of complaints determined by an Ombudsman

Only TPO has the authority to decide whether a complaint is to be upheld or not. And there has been little change in the proportion of complaints upheld compared with previous years, as the chart below illustrates:




## Subject matter of closed investigations (top 10)




Source: The Pensions Ombudsman: Annual Report and Accounts 2016/17

# How wide is an adviser's duty of care?

In Denning v Greenhalgh, the High Court examined the circumstances in which a professional adviser owes a duty to review historic advice and transactions entered into by their client.

## Background

Mr Denning was a deferred member of a DB scheme, having left service in 1994. In 2000, he received advice from Alexander Forbes (AF) which resulted in a transfer of his DB benefits to a personal pension arrangement.

Mr Denning raised concerns with AF about the performance of the personal pension in 2004, 2005 and 2006. In the end, he transferred his benefits again, to another personal pension arrangement. However, by August 2008, Mr Denning had grown dissatisfied with the service provided by AF, and switched advisers, appointing Greenhalgh Financial Services (GFS).

GFS was primarily engaged to advise Mr Denning on his current financial situation and objectives for retirement. GFS were not expressly instructed to review the merits or otherwise of the pension transfer in 2000.

### Complaint to the Financial Ombudsman Service

Mr Denning complained to AF in September 2008 about the second transfer, but initially made no reference to the first. This complaint was escalated to FOS in 2009. In 2010, Mr Denning also raised concerns with FOS over the advice from AF in relation to the first transfer.

The complaint relating to the second transfer was out of time, as it had been made more than six years after the transfer and the advice complained of. FOS also found that Mr Denning knew, or ought to have known, that he had cause for complaint by May 2006 at the latest. Although FOS found the second transfer to have been unsuitable, no award was made as there had been no loss.

### Proceedings against GFS

In December 2014, Mr Denning brought a claim in the High Court against GFS. He alleged they had acted negligently and in breach of duty, because they had failed to review the advice given by AF in relation to the transfer in 2000 and had not advised of a potential claim in respect of that advice. He therefore alleged that GFS' negligence caused him to lose the opportunity to have pursued a claim against AF.

## Decision

### The legal principle – scope of an adviser's duty

The High Court held that GFS did not owe the duty alleged by Mr Denning, and threw out the claim as having no real prospect of success.

The judge focused on the well-established principle that "the extent of any professional duty depends upon the terms and limits of the retainer" agreed between the client and his / her professional adviser. It is only in very limited circumstances that a court will consider a professional's duty to be extended beyond the retainer. The judge noted that for this to happen, there "must, necessarily […] be a close and strong nexus between the retainer and the matter upon which it is said the professional should have advised, but omitted to do so".

He highlighted that, as a matter of legal principle, it would only be in "obvious cases" where an extended duty to advise arises. The judge made reference to the classic analogy as to when an obvious duty, beyond the retainer, arises:

# How wide is an adviser's duty of care? cont.

"If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out his instructions within his area of competence, a lawyer notices or ought to notice a problem or risk for the client for which it is reasonable to assume the client may not be aware, the lawyer must warn him."

## The judge's conclusions

In this case:

- the retainer between Mr Denning and GFS was forward looking, ie to advise Mr Denning on his present and future financial requirements
- GFS was never asked to review and advise on the transfer made in 2000
- GFS had not been provided with the necessary data and information to be in a position to advise on that transfer
- GFS was never paid to advise on the initial transfer
- there was no commercial or factual connection between the historic transfer and the advice GFS was asked to give
- the advice Mr Denning had alleged GFS should have given, was in large part legal advice. There was never any question of GFS having been invited to express an opinion on legal matters.

The claim was therefore struck out by the court, as it had no real prospect of success.

## Sackers' verdict

While this case concerns an individual who received financial advice to transfer out of a final salary pension scheme to a personal pension arrangement – a hot topic in itself – it is also significant to pension scheme trustees in the context of their rights vis-a-vis their professional advisers, including tax advisers, accountants and lawyers.

The case shows how important the retainer is when assessing the scope of a professional adviser's duty.

If a professional negligence claim against an adviser or former adviser is to get off the ground, trustees should consider first and foremost the terms of their retainer (and any related agreements or amendments) in order to identify the legal scope of the duties their adviser owes them.

As outlined in this case, the key factor in establishing whether an adviser's duty extends beyond the terms of their retainer is whether there is a substantive connection between the retainer and any potential issue that an adviser might come across when performing their retainer.

# Overpayments: irreversible change of position

## Background

Mrs N partially retired in 2009 and began receiving part of her pension. In 2012, she was told that she had been overpaid, but it was agreed that resolution of the overpayments could wait until she fully retired. Mrs N retired on grounds of ill-health in 2015.

On her retirement, CSP took £2,598.32 from Mrs N's lump sum and offset it against her overpayment balance of £6,598.32. CSP was recovering the remaining balance by reducing her monthly pension.

Mrs N complained that she had relied on the overpayments, and that she had spent the additional income in good faith. She provided evidence of her expenditure, which included home improvements, a new car, repayment of her daughter's credit card debts, financial assistance for her brother, a new television, and funeral expenses. She said that she would have not have spent money on these items had she known that there had been an overpayment.

## Decision

Mrs N had two potential defences to the repayment request. She needed to show that:

- she had so changed her position in good faith, that it would be inequitable for CSP to require her to repay money paid to her in error (change of position)
- there had been an unambiguous representation on which she reasonably relied in good faith to her detriment (estoppel by representation).

The DPO found both defences to be satisfied in respect of expenditure incurred before Mrs N was informed of the correct level of her benefits in 2012. However, from that date onwards, she was only entitled to the benefit due from the scheme, not the higher, incorrect pension that she had been receiving.

The DPO agreed that Mrs N had no reason to believe her pension income was incorrect until told of the overpayment, and that she had spent the money in good faith. She had also provided evidence to show that the money had been spent on items that would not ordinarily have been incurred, and in such a way that the money could not be retrieved.

CSP was directed to repay Mrs N the overpayments that it had already recovered, with interest, and that it should not attempt to recover any more money.

Although the DPO found that the repayment request had caused Mrs N distress and inconvenience, she did not consider it appropriate to make a further award given that Mrs N had had the use of the overpayment.

## Sackers' verdict

Complaints relating to overpayments are common, but successful defences less so.

Here there was clear evidence of various items of expenditure, including monetary gifts to family members and improvements to Mrs N's daily standard of living. The DPO found that Mrs N would not have made these payments without the overpayment.

Whether or not a defence to a repayment request can be made out will very much depend on the circumstances of any particular case.

# Pensions litigation round-up

## Overpayments: beware of the time bar and potential loss of the opportunity to recover

In 2016, the High Court found in Webber that where an overpayment is based on a mistake, time for recovery starts to run when the mistake is discovered, or could have been discovered with reasonable diligence. It also ruled that the limitation cut-off date for such complaints is the date on which TPO receives the respondent's reply to the complaint.

The recent case of Mrs G involved a complaint about a request for repayment of an overpaid pension from the Teachers' Pension Scheme. TPO held that the administrator was time barred from seeking recovery as no "exceptional or excessive measures" would have been required by the TPS to discover the overpayment. Following Webber, the cut-off date for recovery was when TPS replied to the complaint. TPS had had six years in which to recover the money paid to Mrs G.

A key lesson to be learned is that any time taken by a trustee or administrator to overcome a member's concerns and reach an agreement with the member has the potential to reduce the amount of overpayment that trustees can recover, unless the trustee takes steps to stop time running.

## Payments for distress and inconvenience set to rise

In 2015, TPO published guidance on redress for non-financial injustice, such as distress and inconvenience. Such awards are not automatic but, if conferred, the usual starting point has been £500, in line with industry practice. In most cases awards have ranged from £500 to £1,000 but up to £5,000 has been awarded in extreme cases.

However, in the 2017 High Court case of Baugniet v Capita Employee Benefits Ltd, the judge commented that the upper limit of £1,000 for maladministration "falling short of being very exceptional", had been set nearly two decades ago was now "out of touch with the value of money". He urged TPO to rebase the upper limit at £1,600 (the present equivalent of £1,000 in 1998).

While TPO's 2015 guidance has yet to be updated in the light of this case, awards of up to £1,600 have been made in some TPO cases decided since the Baugniet judgment. Trustees and administrators should therefore be aware of this decision when handling complaints where there has been distress and inconvenience.

## Latest news from TPR's Determinations Panel

The DP is a committee of the Pensions Regulator which operates separately from other parts of the organisation, including TPR's case teams. It has separately appointed panel members and legal support which enables it to make independent and impartial decisions.

In its annual report, TPR notes that in the year 2016/17, the DP made 41 determinations and exercised 42 powers. TPR notes that it has seen a significant increase in case volumes over the year, and was asked to consider two powers that it has not exercised before:

- the power to require a "skilled persons" report – TPR can require the trustees, manager and/or employer of a workplace to provide it with a report on specified matters, prepared by a person nominated or approved by TPR – this power was used on two occasions in 2016/17
- the power to issue a civil penalty – in 2016/17, TPR exercised this power 33 times, each time in relation to the non-completion of a scheme return, which is a legal duty.

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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 commenting that it is the "go to firm in this area of law".

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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- DC briefing (August 2017)
- checklist on getting ready for the GDPR (July 2017)


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