Sackers

Pensions & Investment Litigation Briefing

April 2018

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

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Abbreviations

CETV: Cash Equivalent Transfer Value
DB: Defined benefit
DC: Defined contribution
DPO: Deputy Pensions Ombudsman
GDPR: General Data Protection Regulation
ICO: Information Commissioner's Office
IDRP: Internal Dispute Resolution Procedure
NRD: Normal Retirement Date
PPF: Pension Protection Fund
TPAS: The Pensions Advisory Service
TPO: The Pensions Ombudsman
TPR: The Pensions Regulator

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Overview

"It's all change this month for TPAS and TPO. The TPAS disputes function has joined forces with TPO, whilst TPO itself has moved office. Trustees should ensure that scheme documents and member communications reflect these changes – see page 3.

From time to time, trustees get asked by members to disclose minutes of their meetings. There may be good reason to do so, but not in every case. Trustees should therefore consider each request carefully. We set out things to think about on pages 4-5.

With the GPDR coming into force next month, it is no surprise that data protection is one of this year's hottest topics. And we are already seeing members trying to use a data protection angle in complaints about data errors – we look at one such example on page 6.

One pension scheme member looking to transfer out his benefits got an unpleasant surprise when he realised just how much they would be reduced because of the scheme's underfunding. However, the trustees in this case could not be criticised for their approach – read more on page 7.

We will be running our annual Pensions & Investment Litigation seminar on 5 June 2018 (with a webinar repeat on 7 June). This year the focus will be on TPR's powers and the increasing relevance of these powers to all schemes. Further details will be available towards the end of April."

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In this issue

In the news

Two become one

The TPAS dispute resolution team, and its volunteer network of over 350 advisers, merged with TPO with effect from 1 April 2018. The transfer is intended to "simplify the customer journey" by allowing people to access all pensions dispute resolution functions, whether pre- or post-IDRP, in one place.

Separately, TPAS will continue to focus on providing pensions information and guidance, and will become an integral part of the new single financial guidance body, together with the Money Advice Service and Pension Wise. The new guidance body is being legislated for in the Financial Guidance and Claims Bill, which is currently undergoing scrutiny in Parliament. Its launch is on the cards for, at the earliest, autumn 2018.

On the move

In "the first of many exciting changes" for TPO in 2018, it moved to a new HQ on 3 April 2018. It is now located in the Government Hub in Canary Wharf, at 10 South Colonnade, London E14 4PU.

Update scheme documents and member communications

With both these changes now complete, trustees should ensure that scheme documentation and member communications signpost each of these services correctly.

Payments for distress and inconvenience on the rise?

A number of recent cases have seen larger than normal awards for non-financial injustice (often referred to as "distress and inconvenience" (D&I)). While TPO's guidance on redress for D&I points to a standard range between £500 to £1,000:

- in 2017, 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
- also in 2017, the High Court in Baugniet v Capita Employee Benefits Ltd described the upper limit of £1,000 for compensation for D&I on grounds of unexceptional maladministration (which had been set two decades ago), as being "out of touch with the value of money". TPO was urged to rebase the upper limit at £1,600 (the equivalent of £1,000 in 1998)
- TPO, in 2018, found that Mrs Y, who lost the opportunity to transfer her benefits to a qualifying recognised overseas pension scheme (QROPS) because of lengthy delays, had 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.

Trustees and administrators should keep an eye on developments in this area when handling complaints involving D&I.

Disclosure of trustee meeting minutes

Overview

Scheme members and other beneficiaries do not have an absolute right to the disclosure of all scheme documents. There is a statutory obligation for the routine disclosure of certain documents, such as an annual DB scheme funding statement or DC benefit statement. Other documents must be disclosed on request, for example, the scheme's annual report and accounts. However, trustees will need to consider requests for the disclosure of other documents, such as trustee meeting minutes, on a case-by-case basis.

Dealing with requests from members

The generally-accepted position is that, where a decision is taken by trustees in relation to a member, that member is entitled, in broad terms, to understand the basis for the decision. As such, they may have good reason to see at least an extract from the minutes of the meeting at which the trustees took that decision. On other occasions, however, a member's request may be seen as "fishing" for more general information in relation to trustee discussions, for example, on scheme funding. Such requests are likely to be easier to turn down.

Approach of TPO and the Courts

Traditionally, courts have appeared to favour a beneficiary's proprietary right to see "trust documents", which is generally understood to include trustee meeting minutes. However, it is necessary to balance the competing interests of trustees (who may have good reason to keep their decision-making confidential), and beneficiaries (who must be able to force the proper administration of the pension trust).

Ultimately, both the courts and TPO have discretion to order disclosure of trustee minutes if they determine it appropriate to do so. In addition, TPO may consider a failure to disclose trustee minutes on request to be maladministration, and award modest compensation where non-disclosure could be considered poor administrative practice.

Confidentiality

As there is no absolute right to disclosure of trustee minutes, the starting point is that, where appropriate, confidentiality of information contained in the minutes can be a basis on which to refuse disclosure.

However, trustees should be aware that this is subject to the court taking a different view as to whether disclosure would be in the interests of beneficiaries, and ordering disclosure in any event. Confidentiality agreements usually recognise that the duty of non-disclosure is overridden by a court direction to disclose.

Data protection considerations

"Data subjects" (defined under the GDPR as identified or identifiable natural persons) have a right to be informed if a data controller (eg the trustees in relation to a pension scheme) is processing personal data in relation to him or her. They must also be provided with certain information about the way their personal data is processed. When personal data is contained in trustee minutes (for example where trustees have considered an exercise of their discretion in relation to an individual), the relevant section may generally need to be disclosed in response to a member "subject access request". This does not, however, lead to a duty to disclose the parts of the minutes that do not refer to the member in question.

Disclosure of trustee meeting minutes cont.

Some practical tips

1

"Fishing" or a legitimate request?

The way in which trustees deal with any given scenario will depend on the actual or perceived basis of the request. For example, is the member "fishing" for information that is not otherwise available (such as funding information connected with a triennial valuation)? Or is an individual requesting information relevant to a decision that directly affects him or her (for example, an application for an ill-health pension)?

2

What are members entitled to?

In relation to particular queries, members are entitled to understand, in broad terms, the basis of a decision which affects them. This should be borne in mind by trustees when preparing their minutes and responding to any requests for disclosure. It is important to be aware that a request for minutes is often a proxy for a request for **reasons** for a particular decision.

3

Documenting and communicating reasons

Trustees should take care at the outset when recording deliberations and decisions, to ensure that the level of detail is appropriate. If a communication is sent to a member about a decision and the reasons for it, it is essential that the communication is consistent with the underlying record of the decision-making process (ie the minutes). This ensures that, in the event that disclosure of the minutes is ordered or otherwise deemed necessary, there is no discrepancy which could lead to undue scrutiny of the trustees' decision-making process.

4

A layered approach

Different scenarios will merit different responses or layers of responses. In some cases, an initial holding response, followed by a considered response explaining why trustees are not agreeing to disclosure, may be the end to a matter. In other cases, communicating reasons for a decision will obviate the need to provide the minutes themselves. In cases which develop further, there may be other opportunities to consider the disclosure of minutes (or an extract) later down the line, for example as part of or following completion of a scheme's IDR process.

5

Is it easier to disclose than not?

When dealing with a member request for disclosure, trustees should always be mindful of whether (and at what point) it may be easier – in terms of resolution of the matter in question – to disclose the relevant section of the minutes. In these circumstances, the trustees may seek to avoid undue suspicion from the member, or to pre-empt the view that TPO or a court would otherwise take.

Data protection

Errors in scheme member personal data

TPO recently considered whether basic administrative errors, and concerns over data protection, were indicative of an incorrect pension entitlement. The complaint was not upheld.

Background

Mrs L was employed by Samuel Rains & Son Ltd between 1978-1985, and a member of the company's DB scheme. The scheme wound up in 1999, when benefits transferred to a Section 32 buyout policy with Aviva (the Aviva Pension Plan (the Plan)).

In 2009, Aviva migrated all Plan data onto a new system, at which point they recorded the first line of Mrs Ls' address incorrectly.

With Mrs L's NRD approaching, Aviva wrote to her in 2016 to confirm her entitlement, provide information about the Plan and explain her options. She did not receive the letter.

In January 2017, Mrs L traced her pension and contacted Aviva to request details. Aviva enclosed a copy of the information they had originally sent in 2016, confirmed the level of annuity agreed when the scheme was bought out, and informed Mrs L of her options. Mrs L had also requested a copy of her contribution history and deferred annuity policy schedule. Aviva could not provide the contribution history as there had been no contributions since they assumed responsibility for the Plan. They did not have the policy schedule "due to the time elapsed".

Mrs L argued that her pension should have been higher. She complained to TPO, saying that her retirement plans had been "seriously financially impacted" as a result of Aviva's failures. She considered that data errors with her address, and the loss of data that would otherwise have provided her contribution history and the policy schedule, made it reasonable to assume that there could also be errors in her pension record.

Decision

TPO concluded that no further action was required by Aviva:

- despite Aviva not having retained historical information, there was no evidence to suggest that the level of benefit quoted was incorrect
- an offer by Aviva of £300 for D&I was reasonable
- Mrs L should contact the ICO with any further data protection concerns.

Sackers' verdict

With data protection very much in the spotlight in the run-up to the GDPR coming into force on 25 May 2018, it is unsurprising that members are looking to drop data protection into complaints regarding data management. But as TPO makes clear, errors in the information provided to members do not automatically amount to a breach of data protection principles. Specific data protection concerns should generally be addressed to the ICO.

Transfers

Underfunding and reduced transfer values

The DPO has rejected a complaint that a member's CETV was improperly reduced.

Background

Mr D applied for a CETV quote in September 2016 in relation to his benefits in the Nord/LB Retirement and Death Benefits Plan (the Plan). As the Plan was underfunded, the trustees obtained an insufficiency report from the Plan Actuary to assess whether they could pay CETVs in full.

The actuarial report found that the Plan was 84.9% funded on the CETV basis. The maximum reduction that could be applied to a CETV was therefore 15.1%, equivalent to a 45% reduction to the part of a CETV in excess of PPF levels of compensation. It also noted that if large CETVs were paid in full, the funding level of the Plan would be significantly reduced for the remaining members.

The trustees accepted the Actuary's advice and decided to apply a 45% reduction to the part of Mr D's benefit in excess of PPF compensation levels. The amount quoted to Mr D was therefore £223,043.51 lower than a full quote would have been.

Mr D complained on a number of grounds, including negligence on the part of the trustees, whom he said should have sought additional funding from the employer to cover the Plan's liabilities.

Decision

The Adjudicator first considering the case found that the trustees had "fully complied with the criteria required" by the legislation governing the calculation of transfer values. This included seeking the assistance of the Plan Actuary, and relying on the Actuary's insufficiency report.

In particular, the trustees had a duty to act in the interests of all Plan members when considering transfer requests, balancing the needs of those wishing to transfer out, against those remaining in the Plan. In deciding to pay a lower CETV, they reduced the risk to the members remaining in the Plan.

The trustees had also complied with their legal scheme funding duties, which included having in place a recovery plan to make up the funding deficit.

Mr D could have taken steps to mitigate his loss, for example by not proceeding with the transfer once he was made aware that his CETV had been significantly reduced.

The DPO agreed. And whilst she sympathised with the circumstances in which Mr D now finds himself, the evidence was clear that the trustees had fully complied with the transfer value legislation to reduce CETVs. As such, there had been no maladministration on their part.

She also noted that concerns raised by Mr D regarding funding and investment were a matter for TPR, not TPO.

Sackers' verdict

With many schemes in deficit, this decision provides an important reminder of the steps to take when dealing with transfer requests. For some schemes, even one or two large transfers out on a full CETV basis, could have a big impact on the overall funding and the money left to pay the benefits of those remaining in the scheme.

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Contact

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