

Pensions & Investment Litigation Briefing

December 2018

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



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Abbreviations

CJEU: Court of Justice of the European Union

CPI: Consumer Prices Index

DB: Defined benefit

DC: Defined contribution

D&I: Distress and/or inconvenience

DWP: Department for Work and Pensions

FOS: Financial Ombudsman Service

GMP: Guaranteed Minimum Pension

IDRP: Internal dispute resolution procedure

RPI: Retail Price Index

TPAS: The Pensions Advisory Service

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

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Overview

“2018 has been another busy year for everyone involved in workplace pensions. Not least for TPO, who moved office and took on the TPAS disputes resolution function back in March. On pages 6 and 7, we highlight the latest signposting wording for directing members to TPO, and TPO’s recently revised guidance on payments for “distress and inconvenience”.

TPAS, meanwhile, is getting ready to become part of the new Single Financial Guidance Body from January 2019. As TPAS has found, some pensions questions are more common than others – we share the most topical, and other highlights from their latest annual report, on page 3.

With pension transfer complaints continuing to dominate the headlines, FOS has made this the main focus of its latest newsletter – see page 3.

The trend for keeping the courts busy on pensions matters looks set to continue in the new year. Among the expected highlights for 2019 are:

- the Court of Appeal’s judgment in the case of *BT plc v BT Pension Scheme Trustees* (expected in January). This year, the [High Court ruled](#) that a switch from RPI to CPI under the scheme’s rules was not triggered as RPI had not become an inappropriate index
- the application of limitation periods when recovering overpayments by pension schemes will be considered again in *Burgess v Bic UK Limited*, when the Court of Appeal hears the case in February
- judgment is awaited from the CJEU in [Safeway v Newton](#), regarding the retrospective equalisation of Normal Pension Age.

With best wishes for the festive season and 2019.”



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In the news

FOS: focus on pension transfers

Pension transfers continue to be a hot topic, and this is no exception for FOS. In its latest newsletter ([issue 146](#)), FOS presents:

- its expectations of financial advisers who help customers with transfers from DB schemes, highlighting the Financial Conduct Authority's recently published [rules and guidance](#) on improving the quality of pension transfer advice
- an in-depth look at the pensions landscape by a panel including former pensions minister, Sir Steve Webb, and current Pensions Regulator, Lesley Titcomb, and
- several case studies on complaints involving DB to DC pension transfers, and the facts that FOS will consider when seeking to put things right.

TPAS annual review

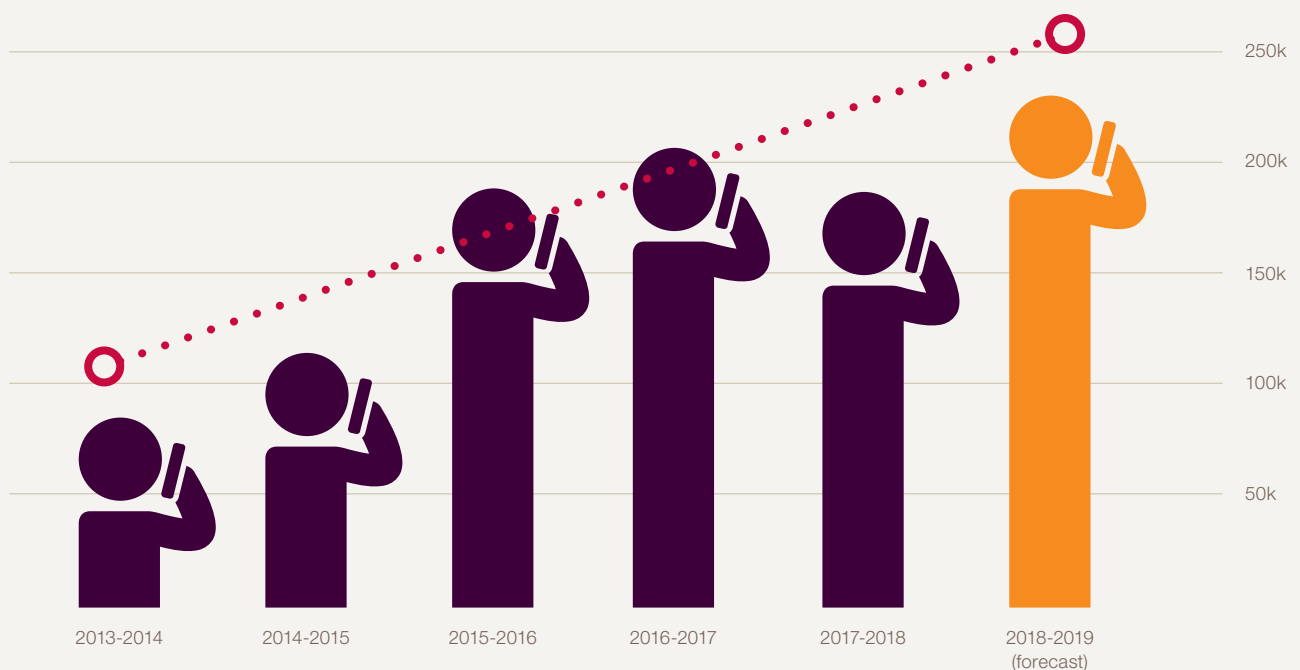
In its latest [annual review](#), TPAS presents key statistics from the past financial year and sets out details of the customer queries it typically receives.

In 2017/2018, some 186,509 pension savers contacted TPAS for help with their pensions. The introduction of the retirement freedoms in 2015 is cited as one of the drivers behind the increased use of TPAS' services. TPAS expects the trend to continue, with the number of people seeking help forecast to exceed 200,000 in 2018/19.

Questions relating to taking benefits, the payment of contributions and pension transfers are among those most commonly raised. TPAS explains, through a selection of case studies, the types of help and guidance it provides in these scenarios.

Meanwhile, TPAS continues to consider new ways of offering its services. One initiative currently being contemplated is the use of online "chat bots" to help deal with popular questions.

Customers contacting TPAS



Source: [TPAS annual review 2017/18](#)

Underpayments: dealing with arrears and interest

Back payment issues arising in the Lloyds GMP equalisation case

The recent High Court case of [Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank plc and others](#) identified and addressed a number of questions about members' rights to payment of arrears of pension where there have been past underpayments.

While the case looked specifically at arrears flowing from the need to equalise benefits for the effect of GMPs, the ruling is likely to have wider implications for trustees and members in relation to underpayments generally.

Two main issues relating to back payments arose in the Lloyds case

1

Should arrears be paid going back...

- 6 years (and if so, before what date)
- to 17 May 1990, or
- to some other date?

2

What rate of interest should be applied?

Members' position

The members argued that the trustee was obliged to make good any underpayments going back over the whole period that the pension had been in payment, with no limitation period.

The members argued that interest should be paid at 2% above base rate, and that it should be compounded monthly or annually. They also argued that there was legislative support for simple interest at 8%.

Employers' position

By contrast, the employers argued that the time limits under the scheme rules applied. This would mean unclaimed arrears going back six years or more from the due date would be forfeited.

The employers argued that simple interest at base rate should be applied.

Underpayments: dealing with arrears and interest cont.

Decision

The judge considered each scheme's forfeiture rules and held that the trustee was not bound to pay arrears which date back six or more years from the date claimed.

The judge also looked at the schemes' forfeiture provisions to determine whether these were permitted under section 92 of the Pensions Act 1995 (which establishes the statutory forfeiture rules) and found them to be compliant.

Finally, the judge considered whether, in any event, statutory limitation periods applied to a member's right to claim arrears from trustees. He held that there was no statutory time limit in relation to bringing such claims.

The parties agreed that when a beneficiary is paid arrears of pension that are due, interest should be added for the period during which each instalment was due and unpaid. However, they disagreed over the rate of interest payable.

The judge noted that it has generally been recognised that a rate of interest of 8% (one of the rates proposed by the representative beneficiaries) has, both in recent years and currently, been deemed inappropriate when a court is asked to fix a rate to compensate a claimant "for being kept out of his money". It is also "much higher than would be awarded under the equitable rules as to interest". He therefore held that interest of 1% above base rate was the equitable result.

The judge also noted that if base rate had been significantly higher, he would not have gone above that threshold. However, as base rate has been low for some years, this was insufficient to compensate the pensioners for being kept out of their money.

He also noted that it is still the court's normal practice to award simple rather than compound interest.

Sackers' comments

There are key points to take from the case when dealing with arrears and interest for past underpayments.

- A scheme's rules will govern the period for which a member will be able to claim arrears. If they contain no forfeiture provision, there will be no time limit, meaning that a member can recover all underpayments.
- Scheme rules must comply with section 92 of the Pensions Act 1995. They cannot be more restrictive than the statutory provisions but can be more generous.
- Rules need to be construed on a scheme specific basis. For example, some rules may give trustees discretion in relation to arrears.
- The question of whether a member must actively claim payments for arrears, or whether trustees can draw a line in the sand (for example, six years from date of judgment or the date on which they determine the basis for equalising in their scheme) was left unanswered.
- The judgment provides welcome clarity regarding the appropriate rate of interest to apply to back payments. The judge's comments on the impact of the current low interest rates are also helpful.
- Confirmation that simple interest should be applied – an easier calculation than compound interest – will be welcomed by some.
- Interest can only be applied to the arrears payments payable, which in turn will depend on whether the limits of the forfeiture rule apply (as covered in Issue 1).

Contacting TPO about pensions disputes

TPO: the first port of call for occupational pension complaints and disputes

TPAS' dispute resolution function was transferred to TPO in March 2018. Previously, TPAS provided advice and guidance in relation to pensions disputes, generally before and during a scheme's IDRPs, whereas TPO typically dealt with complaints that had been through IDRPs. Since the transfer, TPO has been the main port of call for all complaints and disputes relating to occupational pensions. TPO has established an "Early Resolution Service" which members can use to get impartial assistance before or during the IDRPs process.

This move was made ahead of the formal launch of the [Single Financial Guidance Body](#), which is set for January 2019. The new body will take on TPAS, as well as the advice services currently offered by [Money Advice Service](#) and [Pension Wise](#).



Signposting TPO

To help trustees tell members where to get help if they have a dispute concerning their pension, TPO has published a "[signposting template](#)". This explains how the transfer of the TPAS dispute resolution function to TPO is intended to "simplify the customer journey", and that customers can now "access all pension dispute resolution, previously handled by two services, whether pre or post IDRPs at TPO".

The template includes example wording that trustees can use when signposting TPO to members, for example in their IDRPs or responses to complaints. It also contains examples of both long and short form wording for use on a pension scheme website.



DWP and TPR clarify signposting position for occupational pension schemes

Although TPO took on responsibility for dispute resolution services back in March, technically, trustees are still required to signpost TPAS in this context as the legislation has yet to catch up. To reassure trustees that a pragmatic approach is what is needed until the legislation is amended, the DWP and TPR have issued a joint [statement](#) to clarify matters.

The statement confirms that all complaints and disputes about occupational and personal pension schemes should go to TPO, while general requests for information and guidance should be directed to TPAS.



Consider updating scheme documents and member communications

Schemes should use the new signposting wording when dealing with members about specific complaints. They should also think about updating the wording used in any member communications, including the scheme booklet.



TPO awards for distress and inconvenience

TPO has updated its factsheet on redress for non-financial injustice (commonly known as “distress and inconvenience”). Its aim is to enhance transparency, create consistency, and to manage expectations for all parties to a complaint. The factsheet sets out fixed amounts for D&I awards, which will now generally fall into one of five categories: nominal, significant, serious, severe and exceptional.

Non-financial injustice awards are usually treated as [scheme administration member payments](#) for tax purposes and therefore assessed under the general tax rules (such as PAYE) rather than those governing registered pension schemes.

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”, eg concern, anxiety, anger, disappointment, embarrassment or loss of expectation an applicant may experience, ranging from mild irritation to anxiety requiring medical treatment.

How does TPO assess non-financial injustice?



TPO will consider each case on its own merits, taking account of all the submissions and evidence of the parties when determining what the appropriate award will be. Relevant factors TPO may consider include:

- whether maladministration was obvious and the complaint could have been avoided / resolved early on
- how well the respondent handled the complaint
- whether there were excessive or readily avoidable delays
- whether any maladministration (and resulting D&I) took place on a single occasion or many times.

How much might TPO award?

Award	Amount	Comment
Nominal	No award	TPO is unlikely to make an award where there is minimal / no D&I, but may make a direction for the respondent to offer a simple apology.
Significant	£500	TPO’s starting point where there has been some significant D&I, its effect was short-term and reasonable steps were taken to put things right.
Serious	£1,000	There has been a serious level of D&I that has materially affected the applicant, eg over a prolonged period or on several occasions.
Severe	£2,000	This could include “chronic situations”, including numerous and/or repeated or compounded errors over a prolonged period, which had a lasting effect.
Exceptional	> £2,000	One or more severe factors apply and there has been an aggravating factor, such as wilful or reckless behaviour by the respondent and grave health consequences for the member.

Sackers’ comment

The categories are intended to serve as a guide for parties to a complaint. While each complaint is assessed on its individual circumstances and awards will vary depending on the complaint, TPO explains that similar complaints should result in consistent and broadly comparable awards.

Trustees will still be able to offer an award under the IDRPs at what they consider to be an appropriate level (eg £750) and are not strictly bound only to offer one of TPO’s range of figures.



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 2019 commenting that "They are exceptional. Their knowledge in pensions is second to none" and that they have "standout expertise in investment-related litigation".

Sackers is the UK's leading commercial law firm for pension scheme trustees, employers and providers. Over 60 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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- [Finance & investment briefing](#) (December 2018)
- [DC briefing](#) (October 2018)