

## Pensions & Investment Litigation Briefing

April 2019

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
- DWP:** Department for Work and Pensions
- FCA:** Financial Conduct Authority
- GDPR:** General Data Protection Regulation
- IDRP:** Internal Dispute Resolution Process
- MAPS:** Money and Pensions Service
- MAS:** Money Advice Service
- PSIG:** Pension Scams Industry Group
- TPAS:** The Pensions Advisory Service
- TPO:** The Pensions Ombudsman
- TPR:** The Pensions Regulator

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## Overview

“Trustees’ decisions are coming under increasing scrutiny, from both members and the world at large. To help trustees through the process, we held a seminar this month on recent developments and decisions of the Pensions Ombudsman, and how they affect the approach that trustees should take when making decisions and handling tricky complaints. In this briefing, we take a closer look at some of the issues discussed.

On page 3, we cover the introduction of TPO’s “early resolution” process, which aims to ensure that complaints to his office are dealt with swiftly and expeditiously.

The trustees’ role in processing transfers came under the spotlight in 2013, when TPR introduced its “scorpion campaign” to warn against pension scams. Since then, the level of due diligence needed to deal with member transfer requests has expanded significantly. On pages 4 and 5 we consider how things have changed, and how trustees can be prepared to deal with any complaints which may arise.

We also look at two recent decisions, on death benefits and overpayments, and the lessons that can be learned from TPO’s current approach (see page 6).

In other news, the proliferation of pension scams, partly as a result of the recent increase in the number of transfer requests, is the focus of PSIG’s recent scams survey – we look at the results, as well as new powers on the horizon for TPR, on page 7.”



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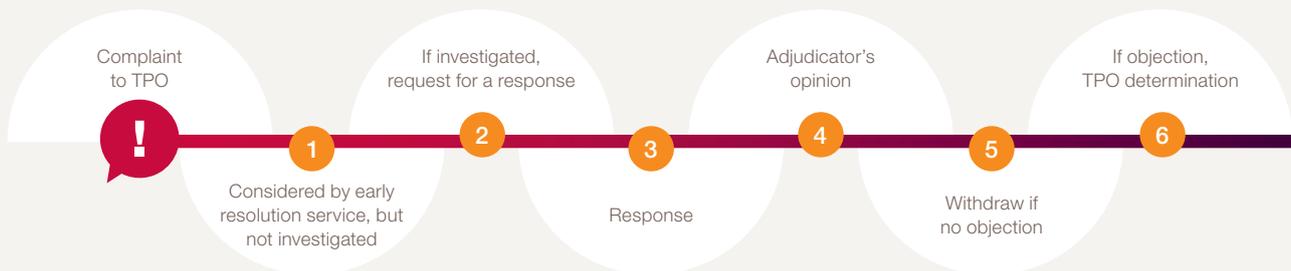
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# Dispute resolution: recent developments

## TPO introduces “early resolution” service

Following the transfer of the TPAS dispute resolution function to TPO in March 2018 (as highlighted in our [December 2018 briefing](#)), TPO has become the first port of call for all complaints and disputes relating to occupational pension schemes. Previously, TPAS provided advice and guidance in relation to pensions disputes, generally before and during a scheme’s IDR process, whereas TPO typically investigated complaints that had been through IDR. To accommodate these changes, TPO has established an “Early Resolution Service” which members can use to get impartial assistance before or during the IDR process.

## TPO process



While “early resolution” can be used before a member brings a complaint through their scheme’s IDR process, trustees may still wish to point a member towards IDR, to help resolve and/or better scope the complaint.

As well as making use of the early resolution service, TPO’s overall determinations process is also now more streamlined, with greater reliance on adjudicator opinions to help deal with complaints swiftly. The process is intended to be less rigid and adversarial than it had been previously, but parties to a complaint retain the right to a full determination from TPO if they do not accept the adjudicator’s opinion (see above).

## Further changes ahead?

The DWP consulted in December 2018 with a view to:

- making new provisions for TPO’s early dispute resolution service
- allowing an employer to make a complaint or to refer a dispute to TPO where it chooses a group personal pension arrangement for its employees, and
- making provision in relation to associated “signposting” requirements.

The government’s response to this consultation is awaited.

## The Money and Pensions Service

MAPS, which took on the guidance function from the former TPAS, as well as the services previously provided by MAS and Pension Wise, finally got its new name on 1 April 2019. The combined body was launched in January 2019 under the temporary name of the Single Financial Guidance Body.

[The Financial Guidance and Claims Act 2018 \(Naming and Consequential Amendments\) Regulations 2019](#) introduce the new name, and make consequential changes to legislation which currently references TPAS and MAS. Schemes should update their literature and member communications to reflect this change at the next practical opportunity.

# Transfers: moving the goalposts?

## Spotlight on transfer processes

For a number of years, trustees have been at the forefront of something of a renaissance in terms of pension transfers. Driven by both government and regulatory efforts to clamp down on pension scams, and the introduction of the government's "freedom and choice" pension reforms in 2015, trustees' processes for managing transfer requests have increasingly come under the spotlight.

### Scorpion literature



TPO considers the high profile "Scorpion Campaign" in February 2013 to be the turning point for due diligence on pension transfers.

As part of this campaign, TPR issued an action pack for pensions professionals on pension liberation fraud and a separate leaflet for pension scheme members, designed to help them understand the risks and warning signs of pension scams.

From this point onwards, TPO believes that trustees should have bolstered their checks on receiving schemes and on those involved in advising members to transfer out.

### Scams code



The Pension Scams Industry Group produced (and recently revised) a code of good practice on "Combating pension scams". The code sets out a useful set of steps, checks and measures that DB schemes could include in their transfer processes with a view to conducting thorough due diligence.

Although the code is not mandatory, TPO is likely check whether trustees have taken account of it when considering whether they have met appropriate standards of administration, and when carrying out due diligence on transfers since 2015.

### Freedom and choice



Since April 2015, the pension flexibilities have given people significantly more choice as to how to use their retirement savings. Transfers have become more popular as a result, as people move their funds in order to access the different options now available to them.

The PSIG code warns that "freedom and choice" brings with it the risk that scammers will target people with access to those freedoms. For example, they may deliberately try to collect information about scheme members approaching retirement age or may specifically target DB scheme members who cannot take advantage of the new flexibilities within their existing arrangements. The latter is increasingly being seen where there is a DB scheme in financial distress, as happened when members of the British Steel Pension Scheme were targeted.

### Joint Protocol



TPR, together with the FCA and MAPS very recently published a joint protocol on transfers, which is designed to help trustees ensure their members are adequately informed when considering transferring their DB pensions. The protocol includes template letters for trustees to send to members, alerting them to the risks of transferring out of DB pension schemes and giving practical information.

The protocol notes that TPR is keen to obtain information, on a monthly basis, about schemes' transfer activity, including:

- the level of transfer activity in a scheme
- the names of any advisers / intermediaries involved
- the receiving arrangements.

The idea is to establish patterns of scam activity across groups of members. Whilst TPR is primarily seeking this information from schemes in distress, or those which are restructuring, it is something that all DB schemes may wish to consider as part of their measures to help combat pension scam activity.

## Transfers: moving the goalposts? cont.

### Beware of historic transfers

Transfers which took place in the months and years following the publication of TPR's "Scorpion literature" are increasingly coming under the spotlight in the form of complaints against transferring schemes. Such complaints can be triggered by any one of a number of factors. For example:

<b>Receiving scheme not as expected</b>	▶ Having transferred their benefits, individuals may find that the scheme they are now a member of is not what it was made out to be, or that they have been the victim of a scam. Members could face lost retirement savings or unexpected tax penalties some years after the transfer and, as such, may look to the transferring scheme for compensation.
<b>Members now bear the investment risk</b>	▶ It may be some time before members who have transferred from a DB to a DC arrangement realise that they now bear the investment risk – something they later regret, particularly where there has been high volatility and potentially lower investment returns and/or expectations. Transferring schemes may offer the only hope of a remedy where those who may have advised or encouraged individuals to transfer out are no longer around to give redress.
<b>Data subject access requests under the GDPR</b>	▶ The hype surrounding the introduction of the GDPR in 2018 prompted a fresh look by former members into the personal data still held by their transferring schemes. The fact that data subject access requests are now simple (and, generally, free) has led former members to use this method to try to obtain evidence about their former scheme's transfer process, with a view to ascertaining whether there were flaws in the processing of their transfer request.
<b>TPO rulings</b>	▶ In the case of <a href="#">Mr N (PO-12763)</a> , a former member of the Police Pension Scheme was reinstated to that scheme following a ruling by TPO that the Police Pensions Authority had failed to carry out reasonable checks in connection with Mr N's request to transfer out. While this decision is fact specific, it may be seen by some as a route to obtaining a favourable remedy.

### Be prepared

Trustees can take steps to be prepared to deal with any complaints concerning past transfers that come their way, for example, by:

- reviewing the scheme's due diligence processes to see how they have evolved over time
- checking whether there always was a formal process in place, what due diligence checks took place and what communications there were with members (including warning notices) and others, and what discharges were sought as part of the process
- being prepared to respond to data subject access requests and being clear as to what personal information they have to provide.

### What does the future hold?

Members currently have a statutory right to transfer in certain circumstances, for example where the proposed transfer is to a registered occupational or personal pension scheme (members may also be permitted under scheme rules to transfer out in other circumstances). The government is considering introducing new restrictions to limit members' statutory right to transfer, for example, a requirement to demonstrate a genuine employment link where the receiving scheme is an occupational pension scheme, as opposed to simply proving that the member is in receipt of "earnings" (from any source), as now. However, it remains to be seen whether the statutory right will change, and if so, how.

Transfers are likely to remain a key area of focus for some time to come. As such, trustees need to be aware of developments and ensure that their processes keep pace with the changing requirements.

# Recent decisions of the Pensions Ombudsman

## Death benefits: refusal to award spouse's pension to civil partner not discriminatory



Mr D was a member of the Buck Consultants' UK Pension Scheme. Following his death, his partner Mr Y, complained to TPO following the trustees' refusal to award him a spouse's pension ([PO-25756](#)).

The scheme rules provided that (for members who left service before 1 April 1999), a spouse's pension would not be available if a member were neither married nor in a civil partnership at the date of retirement.

Mr D and Mr Y had been cohabiting since 1995 (the year Mr D retired). They entered into a civil partnership in 2006. Mr Y complained that they could not have complied with the scheme rules requirement, as civil partnerships did not become legally possible in the UK until 2005.



TPO found that the trustees could only pay a spouse's pension as permitted under the scheme's rules. The requirement under the rules that a couple be married at the date of retirement applied equally to heterosexual couples. As such, Mr Y had not been treated less favourably than a comparable (opposite sex) spouse.

In this case, there was no overriding legislation or case law which would render the scheme rules discriminatory, as the civil partnership legislation was not made with retrospective effect.



### Sackers' verdict

The decision serves as a useful reminder that, even in cases where there may be some sympathy for the member, trustees can only act within their powers, as prescribed by legislation and their scheme's governing documentation.

## Recovery of overpayments: recoupment



TPO rejected the complaint of Dr E ([PO-16856](#)), who argued that he had relied on overpayments of pension to his detriment.

Dr E sought to make out a defence of detrimental change of position on the basis that he had purchased a property for his daughter – he said he would not have done so had he known his correct benefit entitlement. He also argued that the trustee was not entitled to recover the overpayment, as the six-year statutory limitation period had expired.



TPO considered that, on the specific facts of this case, it was likely that Dr E would have bought the property in any event. As such, there was no detrimental change of position. Regarding the limitation argument, TPO held that, unlike a restitutionary claim for recovery of overpayments, equitable recoupment is a self-help remedy which is not subject to the statutory limitation period.

TPO went on to address a question (raised obiter by the High Court) in [Burgess v BIC](#), which suggested that TPO was not a "competent court" with jurisdiction to order a recoupment of a disputed amount. TPO refuted this, setting out how his office meets the legal definition of a tribunal, and asserting that he has power to permit recoupment by trustees in cases where a member brings a complaint to TPO.



### Sackers' verdict

TPO's support of the self-help remedy of recoupment is a positive sign for trustees looking for a reasonable method of recovery of overpayments, especially as he does not see this as being restricted by time limits. However, the member's agreement should still be sought.

In the meantime, TPO has published a [fact sheet](#) setting out in more detail its view that TPO is a "competent court" for the purpose of section 91(6) of the Pensions Act 1995, when making determinations for recoupment in overpayment cases.

## In other news

### Pension Scams Industry Group – Scams Survey Pilot

On 28 February 2019, PSIG unveiled the results of its 2018 scams survey, which sought to ascertain the scale of pension scam activity with a view to better understanding the market and pressures faced by transferring schemes and administrators.

While the research found that detailed information (for example, what sparked a transfer request, and the number that were processed, refused or withdrawn) was generally not readily available, it also found that “organisations go to great lengths to protect members and customers, with impressive and extensive research being carried out on the receiving arrangements as well as advisers and intermediaries”.

The report notes that the time spent by administrators on due diligence ranges from 15 minutes for a straightforward case to ten hours or more for more complex ones. For the sample alone, it is likely that more than 14,000 man-hours were spent on due diligence in one year.

The results also show that scheme administrators collectively put a lot of effort into uncovering the same information in their separate organisations, whereas sharing that intelligence would both reduce the overall amount of effort and increase the level of protection to members and schemes.

PSIG will therefore consider how to create a safe sharing environment for practitioners. It plans to work with the pilot organisations and TPR to agree the optimal approach to gathering key data on scams, balancing the benefits of the data against the effort and cost of its collection.

**PSIG survey looked at data relating to more than 27,000 transfers, worth £1.33 billion**

### A stronger Pensions Regulator

In February 2019, the DWP responded to its [consultation](#) on bolstering TPR’s powers. It believes the enhanced powers will help TPR meet its ambition “to be ‘clearer, quicker, and tougher’”.

TPR is to have access to more timely information to improve its oversight of corporate activity. Changes designed to achieve this include extending the current notifiable events regime, 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, and improving TPR’s existing anti-avoidance powers.

The Government will introduce two new criminal offences targeting “individuals who wilfully or recklessly mishandle pension schemes” and those who fail to comply with a contribution notice. And TPR will be given power to issue a new civil penalty of up to £1 million for more serious breaches of pensions requirements (including failure to comply with a contribution notice).

Once implemented, the changes will raise the stakes considerably for all employers and trustees involved in occupational pension schemes. As yet, however, there is still no clear indication on the likely timing of any changes, with legislation having to wait its turn until parliamentary time allows. In the interim, the Government “will continue to engage with stakeholders on the detail”.

**TPR welcomes its new powers, which it says “will act as a powerful deterrent against the poor treatment of pension schemes and help us in protecting members”**

## Contact

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