

## Pensions & Investment Litigation Briefing

September 2019

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



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## Abbreviations

**AE:** Automatic enrolment  
**DB:** Defined benefit  
**DC:** Defined contribution  
**DWP:** Department for Work and Pensions  
**FCA:** Financial Conduct Authority  
**FOS:** Financial Ombudsman Service  
**GDPR:** General Data Protection Regulation  
**GPP:** Group Personal Pension  
**HMRC:** HM Revenue & Customs  
**ICO:** Information Commissioner's Office  
**IDRP:** Internal Dispute Resolution Procedure  
**MAPS:** Money and Pensions Service  
**NMPA:** Normal minimum pension age  
**TPAS:** The Pensions Advisory Service  
**TPO:** The Pensions Ombudsman  
**TPR:** The Pensions Regulator

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## Overview

“TPR’s annual report for the past year (see page 3) highlights the use of its powers to fine failing employers, replace incompetent trustees and prosecute those who refuse its requests for information.

The forthcoming Pensions Bill is of course expected to strengthen these powers further. Charles Counsell, TPR’s Chief Executive, promises the Regulator “will continue to be clearer, quicker and tougher”, and, as TPR’s recent blog on its “three little words” indicates, it still seems very much to be “living and breathing that mantra”.

Summer also saw the publication of the Pensions Ombudsman’s annual report (covered on page 4) which shows that transfers remain the most likely area to result in a complaint, although numbers are well down from 2017/18 when they made up a fifth of all new cases.

And the speed with which TPO is able to deal with complaints looks likely to increase, following the DWP’s consultation on TPO’s function and jurisdiction, with its focus on the early resolution of queries – see page 5 for more detail.

On page 6 we look at a couple of ICO cases that have examined some of the grounds on which it may be possible to refuse information requests.

We round off this edition with a recent High Court decision on negligent misstatement – a useful reminder to schemes to take care in their communications, especially when it comes to tax.”



**Arshad Khan**

Associate Director, Pensions & Investment Litigation

[arshad.khan@sackers.com](mailto:arshad.khan@sackers.com)

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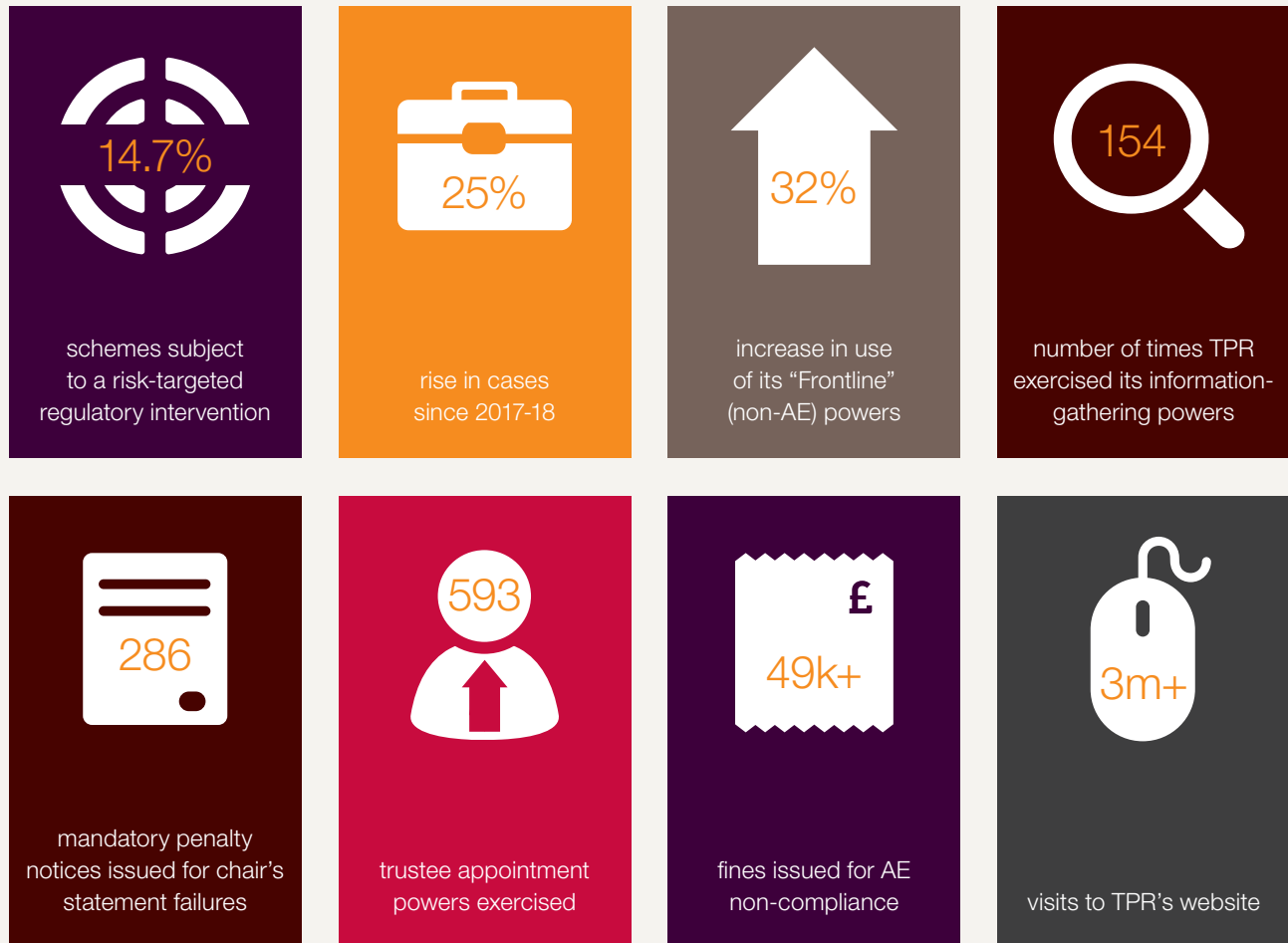
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# TPR Annual Report

TPR released its [annual report and accounts](#) in July. The report highlights actions taken during the year and shows that TPR continues to build on its 2017 and 2018 promises to be “clearer, quicker and tougher”, with DB, DC, AE and master trust schemes all under the spotlight.

## 2018-2019 in figures



## What else is in store?



A Pensions Bill is expected in the autumn, which will contain measures to [upgrade TPR’s powers](#), including extending the current notifiable events regime, improving TPR’s existing anti-avoidance powers, creating new criminal offences and giving TPR power to issue new civil penalties (of up to £1 million for more serious breaches of pensions requirements).



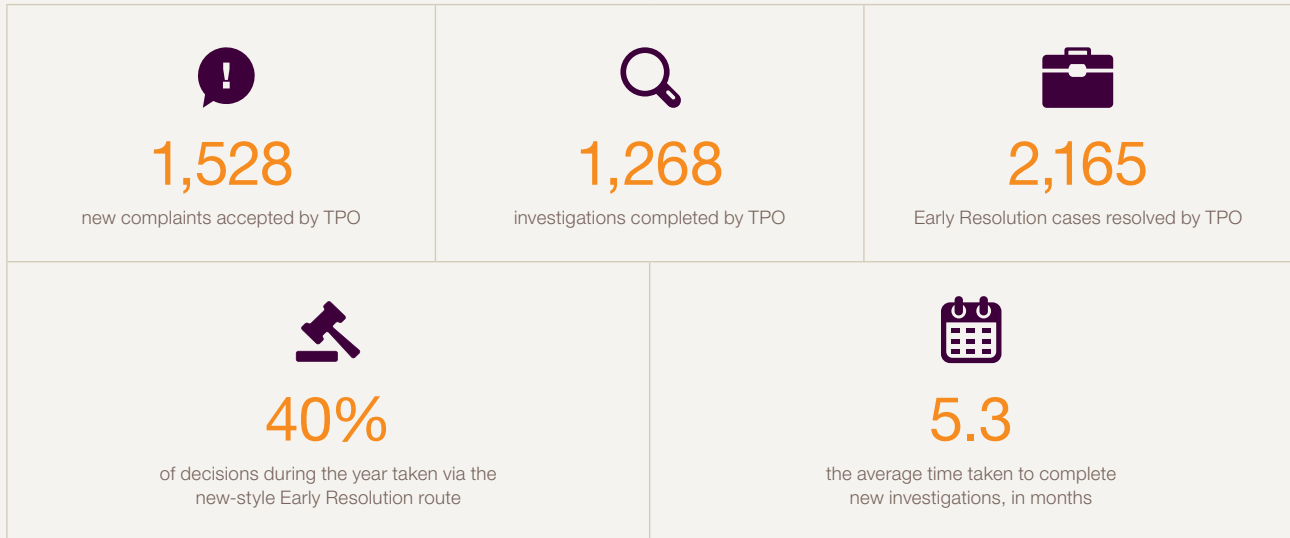
TPR’s consultation on its revised DB Funding code of practice is due in 2020 (though with an initial consultation on the DB funding “framework” likely to arrive this autumn), “depending on the legislative timetable”.

# TPO Annual Report

In July, TPO published its [annual report and accounts](#) covering the service's activities and finances for the past year.

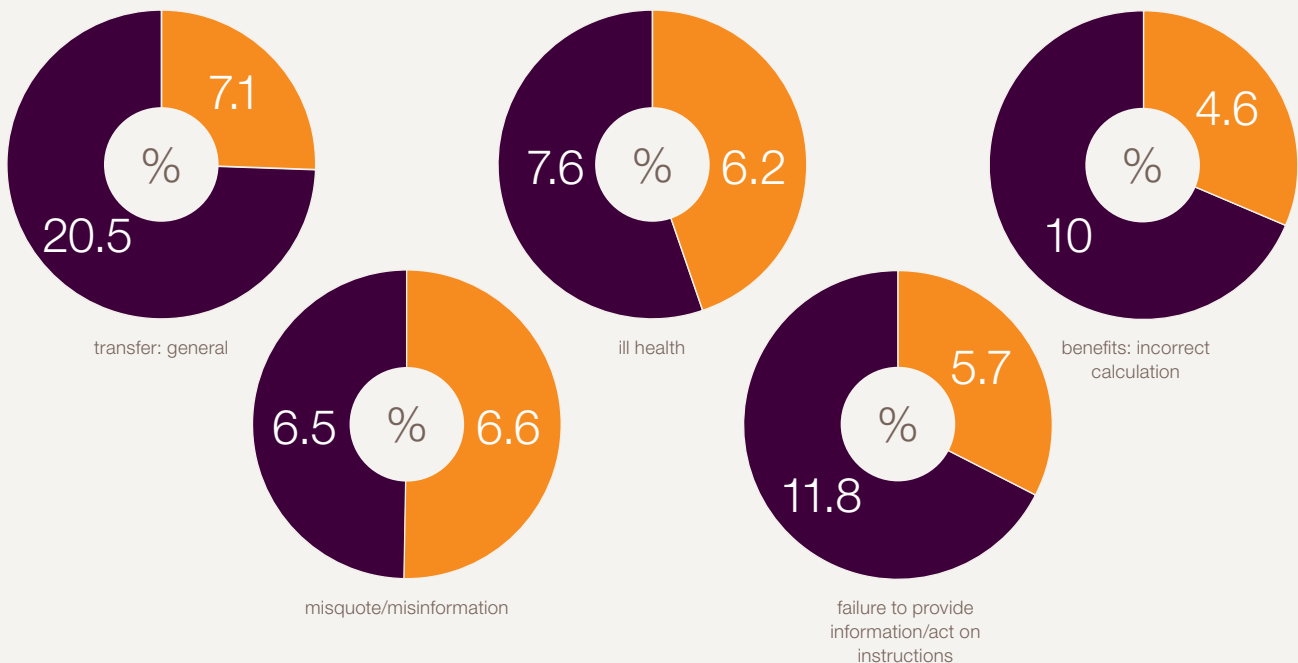
This is the first annual report to include the work of the "Early Resolution Team" which joined TPO from TPAS in March 2018. As well as its usual investigations, TPO now deals with all Early Resolution disputes, bringing the majority of pensions dispute resolution under one roof.

## Key facts and figures



## Subject matter of new investigations – top five

● 2018/2019 ● 2017/2018



Source: [The Pensions Ombudsman: Annual Report and Accounts 2018/19](#)

# Consultation on the function and jurisdiction of TPO

The DWP's December 2018 consultation paper, [The Pensions Ombudsman: dispute resolution provisions and widening of jurisdiction](#), sought views from the industry on measures to make new provisions for dispute resolution by TPO. It ran until 18 January 2019.

On 8 August 2019, the Government published its [response](#) to the consultation, addressing:

- ✓ how best to make provision for dispute resolution by TPO, in particular the function for the early resolution of disputes before a determination
- ✓ measures to allow employers to make complaints or refer disputes to TPO on their own behalf against those responsible for the management of the scheme – for example, where the employer chooses to use a GPP arrangement to provide pensions for its employees
- ✓ making provision in relation to appropriate signposting to TPO's services.

Early Resolution is intended to work as a quicker and cost-effective path. The Government is clear that the intention is not to water down any rights, and parties will still be able to choose the current “more formal” routes of IDRP and Ombudsman determination.

Overall, the responses were supportive of the proposals. The Government states that it will continue to work with TPO, FOS, MAPS and the FCA to see how signposting of the various different roles and responsibilities generally can be best improved. Any amendments to the signposting requirements in relation to personal pension schemes would need to be set out in secondary legislation. The Government plans to liaise with the FCA in relation to any draft regulations, stating in its response that it will seek to bring forward any necessary legislation “in due course”.

In the meantime, the response confirms that TPO is already in the process of introducing a new case management system expected to “considerably improve the customer journey”.

## Comment



- The general thrust of the proposals seems to be that rigidly approached and protracted dispute resolution should be avoided.
- For now, IDRP is not going to be discarded or watered down, but it may become used more flexibly in the future.
- Schemes should ensure that their signposting and member information is up-to-date, checking in particular that member documentation, booklets and IDRP materials reference TPO's “Early Resolution Service”, and more generally keeping a watch on developments in this area.

## Tailored review: recommendations



More recently, on 27 August, the DWP [published a report of its tailored review of TPO](#). Tailored reviews are undertaken to make sure that bodies remain “fit for purpose, well governed and properly accountable for its actions”. The report found that TPO is “a well-respected and effective organisation”, but made various recommendations, which TPO is now working on, including that the organisation should:

- clarify externally what cases are appropriate for the Early Resolution Service, and provide assurance that Early Resolution cases are handled independently from other sections of TPO
- build its relationship with FOS, developing a collaborative process to reduce the potential for customer confusion and duplication of efforts.

# Freedom of Information requests: Recent ICO decisions

## Background



Whilst the rights to make data subject access and freedom of information requests existed before 25 May 2018, they have gained traction since the GDPR came into force, in line with greater public awareness. The volume of queries schemes and public authorities report is noticeably rising, a trend borne out by what we are seeing in practice. But what about when complainants make numerous, repeated or seemingly deliberately vexatious requests? Can these be refused?

## Decisions



Two recent Decision Notices from the ICO relating to requests made under the Freedom of Information Act 2000 (“FOIA”) examine cases where individuals have had requests relating to pensions turned down by authorities.

In the first case, the complainant had requested information from TPO on the transfer of public sector benefits to a particular scheme, and any complaints made to TPO on the subject. TPO had refused to comply, claiming FOIA exemptions. In the second case, the Ministry of Justice had also tried to deny a request relating to abatement of pension on the grounds that it was vexatious. In both cases, the ICO found that the authorities had relied on potential FOIA exemptions incorrectly.

**“Repeat” requests:** in the TPO case, the individual’s second request was much broader than their first, albeit that it was on the same topic. The ICO is clear that a request is only to be considered identical, and therefore may be rejected, if its scope and wording precisely matches a previous request or is substantially similar to it.

In the Ministry of Justice case, the complainant had submitted six FOIA requests on the same issue, but the ICO did not consider this to be “a particularly extensive number of related requests”.

**“Vexatious” requests:** the Decisions look in detail at how “vexatious”, which is not defined in the legislation, should be interpreted. An earlier Upper Tribunal case stated that “vexatious” could be defined as the “manifestly unjustified, inappropriate or improper use of a formal procedure”. The [ICO’s guidance on dealing with vexatious requests](#) also sets out indicators useful in identifying them, including:

- the request burdening the authority or requiring a “disproportionate effort” to be expended
- unreasonable persistence of the enquirer
- futile, frivolous, abusive or intransigent requests.

These factors are not intended to be definitive or exhaustive, and each case should be reviewed “holistically” before a judgment is made.

## Sackers’ verdict



Schemes should be aware that members may attempt to make enquiries of external authorities (eg TPO) in attempts to obtain information relating to disputes about their scheme.

While these decisions focus on FOIA, they provide a useful steer of the ICO’s views generally in the area of vexatious or repeated requests which by analogy may apply to subject access requests under the GDPR. With that in mind it will be appropriate to consider all the circumstances of a request when deciding whether it could be categorised as “manifestly unfounded or excessive”, and treat each request from any one member afresh.

Finally, the ICO reminds us that, whilst it remains possible to refuse burdensome or vexatious requests, all information requests impose some burden which must be accepted in order to meet individuals’ rights.



# Successful appeal from TPO

In July, the High Court made a relatively rare finding, holding a police authority liable for negligent misstatement.

## Facts



The claimants were police officers from two forces (Avon and Somerset, and Essex) who retired before NMPA. They had protected pension ages – that is, a right to receive benefits before NMPA without them being treated as unauthorised, provided certain conditions are met. Subsequent re-employment by a connected employer can cause a protected pension age to be lost, except in specific circumstances. In this case, the officers returned to employment within one month of retirement, losing their protections and becoming subject to tax charges.

The officers complained that they had been encouraged to take up re-employment (a widespread practice), and that they had not been made aware of the consequences of doing so. They complained to TPO that the police authorities (as the administrators of their schemes) and chief constables (as quasi-employers) were in breach of their duties by failing to advise or inform them of the tax consequences.

TPO dismissed their complaints, and the officers appealed to the High Court.

## High Court Judgment



### The authorities' knowledge

Avon and Somerset police authority's communications had stated that payments to the officers would be "tax free". The High Court held that the authority knew the officers were being re-employed shortly after retirement, and that they ought to have known the law in this area: it should have been familiar with the widely publicised changes to the legislation and with readily available guidance. The authority therefore had a responsibility not to make statements which were foreseeably misleading.

The letters had not included any disclaimer of responsibility for the information, and the police authority was not entitled to assume that the officers would seek independent advice. The Court found that the officers had acted reasonably in relying on the statements and that, had they been given the correct information, they would have postponed their re-employment to avoid the tax liability.

### A Scally duty?

The High Court also considered the implications of *Scally v Southern Health Board* ("Scally") (1991). In that case, the House of Lords implied a term into a contract of employment requiring an employer to take reasonable steps to inform an employee of a valuable pension right of which the employee could not otherwise have been expected to be aware. The High Court held that *Scally* had been decided on narrow grounds, and that to find that the chief constables had a duty to warn the officers about the tax consequences of their re-employment would be "a major and unjustified extension" of *Scally*.

## Sackers' verdict



The decision is, of course, specific to its facts. However, it serves as a useful reminder of the duty schemes have to take care in their communications.

The case is also confirmation that *Scally* continues to be applied narrowly, and that the courts are unwilling to impose wider duties of care on employers in terms of protecting employees' economic interests.

## 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 I always get a response in a clear and concise manner."

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.



**Peter Murphy**  
Partner  
D 020 7615 9568  
E [peter.murphy@sackers.com](mailto:peter.murphy@sackers.com)



**Arshad Khan**  
Associate Director  
D 020 7615 9563  
E [arshad.khan@sackers.com](mailto:arshad.khan@sackers.com)



**James Bingham**  
Partner  
D 020 7615 9597  
E [james.bingham@sackers.com](mailto:james.bingham@sackers.com)



**Aaron Dunning-Foreman**  
Associate  
D 020 7615 9521  
E [aaron.dunning-foreman@sackers.com](mailto:aaron.dunning-foreman@sackers.com)

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## Recent publications



- The Sackers [Quarterly Briefing – September 2019](#) highlights significant developments in pensions, covering key areas such as pensions reform, regulatory developments, new legislation and cases
- Sackers [Finance & Investment Briefing – September 2019](#) takes a look at current issues of interest to pension scheme investors
- Our 2019 guide to [buy-ins, buy-outs and longevity transactions](#) considers the increasingly active bulk annuity market and offers practical tips for trustees