

Pensions & investment litigation briefing

December 2020

Sackers' pensions & investment litigation team reviews recent case law and developments, examining the practical lessons for trustees and employers



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Abbreviations

- DB:** Defined Benefit
- DC:** Defined Contribution
- DRC:** Deficit Reduction Contributions
- DSAR:** Data Subject Access Requests
- GDPR:** General Data Protection Regulation
- ICO:** Information Commissioner's Office
- IDRP:** Internal Dispute Resolution Procedure
- PSIG:** Pension Scams Industry Group
- SIPP:** Self-Invested Personal Pension
- SSAS:** Small Self-Administered Scheme
- TPO:** The Pensions Ombudsman
- TPR:** The Pensions Regulator

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Overview

“Times remain challenging for everyone. The economic and regulatory environment gives rise to various challenges for pension schemes, in terms of their interactions with sponsoring employers, in being able to carry out business-as-usual effectively, and in terms of potential member complaints. On page 3, we look at how schemes can prepare themselves in the face of pressure that their sponsors may find themselves under and of legislative change, and on page 4, we review TPO’s Annual Report and the areas that give rise to the most frequent complaints it receives.

We turn the spotlight on rectification on page 6, with a reminder for schemes about the remedy (and its alternatives) following further cases in this area, and we round up developments in transfers and data protection on page 7.

Finally, we have been offering a range of new training sessions as we adapt to the “new normal”. Our Autumn round tables and interactive training sessions looked at a range of topics. See page 5 for some of the highlights.

This extraordinary year has meant that our clients have had to grapple with entirely unexpected and unprecedented circumstances. We wish you and your families an especially peaceful festive season, and all the best for 2021.”



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Employers under stress

The tough economic climate, and new legislation, both recent and forthcoming, mean that schemes need to be more prepared than ever to react swiftly and appropriately to change and requests for change.

Pension Schemes Bill

TPR's increasing supervision and enforcement powers are set to grow further; the new provisions in the Pension Schemes Bill (which is hoped to come into force by the end of the year) reinforce TPR's ability to be "clearer, quicker and tougher", with a raft of extended and new powers, including in relation to interview and inspection. Greater transparency of corporate events will be enforced against a backdrop of potentially onerous penalties and criminal offences. See our [Alert](#) for further detail.

Our recent blog on [TPR's new interview powers](#) looks at the extensions in this area, and how schemes should prepare for and react to such requests.

On 5 November 2020, the Bill completed Committee Stage. During this process, various Lords and Opposition amendments were rejected; in particular, proposed changes aimed at limiting TPR's increased powers were not taken forwards, meaning that some concerns still remain in relation to the potential scope of the criminal penalties under the Bill.

The Bill has now returned to the Lords following report stage and its third reading on 16 November 2020.

Corporate Insolvency and Governance Act 2020

Expedited as a result of COVID-19, the Corporate Insolvency and Governance Act 2020 received Royal Assent in June. The Act is intended to provide businesses in financial difficulties with the flexibility and breathing space needed to explore their options, allowing a free-standing moratorium (similar to the one afforded to employers in administration) and restructuring plans – see our [Alert](#) for more detail. There are potential implications in terms of contributions, enforcement of contingent assets, and engagement with regulatory bodies. DB trustees must ensure they understand the potential ramifications of these changes for their schemes. Given the current climate, we may expect to see employers using the flexibilities the Act gives to make further requests of schemes.

Be prepared

Although TPR has confirmed that the rate of DRC deferral requests so far is lower than first predicted, with the impact of COVID-19 on the economy likely to continue to be felt into 2021 there may be further turbulent times ahead for many scheme employers.

Trustees should keep themselves primed for all eventualities. TPR has written in recent weeks (see our [recent blog](#)) to trustees of DB schemes to reiterate warnings that they should be alert for signs of employer distress (such as profit warnings, credit downgrades or debt refinancing), to ensure that they are prepared in their thinking and that scheme members are treated equitably in all proceedings.

This messaging was reinforced with new guidance from TPR in November, which set out its expectations of, and practical recommendations for, trustees facing such scenarios – see our [Alert](#) for more.

Trustees should ensure that they understand their rights and obligations, that they engage with employers as early as possible, and that they access the information and the advice they need.

Our recent blog on [robust trustee decision-making in these difficult times](#) looks at the considerations trustees should bear in mind in this context, when faced with requests to make significant changes to benefits such as closing schemes to future accrual, switching indexes, and corporate and scheme restructurings (including DRC deferrals). Amongst other things, getting the right advice, managing conflicts and considering privilege will all be vital.

TPO Annual Report

TPO's Annual Report and Accounts, covering its activities and finances for the past year, shows that the demand for its service has never been higher. In the year to 31 March 2020, it handled 11,552 telephone enquiries (a 41% increase on 2018/19) and 8,977 written enquiries (up 24% on the previous year).

What do the complaints relate to?



Outcome of complaints



Source: [The Pensions Ombudsman: Annual Report and Accounts 2019/2020](#)

Following the move in recent years to resolving cases at an earlier stage using its “early resolution” team, TPO notes a decrease in the number of adjudications, and a 16% increase in early resolution investigations. In total, it took on over 3,500 new cases last year, with 2,400 of these being early resolution investigations. It continues its focus on resolving complaints informally (without an Ombudsman Determination), with informal resolutions rising from 80% to 95% of all completed investigations in 2019/20. 29% of cases formally decided were upheld at least in part.

The average time taken for new early resolution investigations to be completed was 3.9 months, and 5.3 months for new adjudication investigations. 11% of investigations were open for more than 12 months.

The year ahead

TPO is prepared for a potential increase in the number of complaints through its door as a result of the pandemic and the ensuing volatility in members’ fund values.

The difficult economic environment that COVID-19 has produced seems likely to result in transfers and scams (see page 7 for further developments in this area) remaining high up the list for next year’s report. Other expected areas for complaints include those relating to the furlough scheme, payment of auto-enrolment contributions, and delays in providing information and processing benefit payments.

PIL Autumn training 2020 – highlights

Throughout the Autumn, the Pensions and Investment Litigation team has been hosting round tables and interactive client training sessions (remotely, of course!).

Topics covered have included:



Dealing with tricky members and situations

Members who are unhappy or who have raised formal complaints can present a significant challenge for schemes. In virtual discussion forums, the team looked at common areas of difficulty when dealing with members, including:

- members without records, and approaches that can be taken
- how to deal with vexatious litigants
- members who wish to appear in person during IDRPs.

The sessions gave opportunity to share experiences and consider how to improve processes and outcomes in these and similar areas.

See also our recent podcast on [dealing with member concerns](#), which looks at issues faced when there is no record of a member.



Discretionary decision making

Discretionary decision making remains an area that causes difficulty and gives rise to a significant number of complaints to TPO. A practical session, with examples in line with typical cases that we see within the firm, our training took attendees through legal and practical guidelines and case studies, including recording and reviewing decisions, as well as handling complaints based on those decisions.

See also our earlier Hot Topic looking at [the impact of COVID-19 on member complaints](#) set out some practical tips and reminders to help you manage the issues that may arise from a spike in complaints. (Note that TPO recommenced accepting complaints after the Hot Topic was published).



Transfers

Transfers, as TPO's Annual Report shows, remain hugely fertile ground for complaints. We gave training on DB to DC transfers, covering the latest developments in this area and dealing with member complaints, based on what we see as risk areas, and on real-life TPO and IDRPs cases. In the current climate, it can seem even harder to balance doing what is necessary to protect members with giving them the opportunity to react quickly to a personal financial or employment situation they may not be able to control or predict. Communicating well with members – which includes explaining your processes, providing all necessary information, and managing expectations – is key.

We also looked at DSARs (see further on page 7), where we've seen a rise in their use by both members and claims companies as a tool to gather evidence that may support a complaint. Schemes should be aware of these and monitor from time to time what the processes should be for responding to them.

See also our podcast on [DB to DC transfers](#), where we discuss what can be done to minimise their risks.

Spotlight on rectification

Rectification is a long-standing court remedy that allows the wording in legal documents, such as trust deeds or contracts, to be corrected if a drafting error is proved.

There has always been a steady stream of cases dealing with the rectification of pension scheme documentation, with huge sums at stake because of the slip of a pen or a moment of inattention. And there appears to be a growing willingness on the part of the courts to grant rectification of pension scheme documents, with the legal principles to be applied also having evolved over time.

Background



Following the Court of Appeal's 2019 decision in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd*, where the principles for rectification were refined in a non-pensions setting, a series of High Court judgments applied these principles in a pensions context (culminating with *Univar*, and with the relevant tests more recently restated in *SPS Technologies Limited v Moitt & Ors*).

Univar confirmed that, in applying *FSHC*, the test for intention is subjective – the aim is to determine the actual collective intent of the parties. It is not necessary to provide evidence of “an outward expression of accord” between the parties to the relevant document. However, “convincing proof” (on the balance of probabilities) that an error has occurred is needed to displace the words used in the document – common sense and arguments as to what is “logical” are sadly insufficient. These are significant tests to satisfy, so the strength of the (usually, contemporaneous and documentary) evidence will be crucial.

Alternatives



Rectification can feel like a sledgehammer to crack a nut. For those involved with a scheme an error may appear so obvious that having to go to court to have a judge agree that a mistake can be corrected feels absurd. *Univar* required a full hearing with witness cross examination – which may horrify many faced with such problems.

Fully contested rectifications are rare but not unheard of in a pensions context. If a representative beneficiary's legal team feel they have arguments to make, trustee and employer claimants are unlikely to be able to prevent this. However, despite the high bar set for rectification, in many cases we deal with it is possible to obtain summary judgment – a much simpler (and cheaper) process.

Where summary judgment is not available, parties may nevertheless be able to agree a compromise – subject to obtaining court approval – as an alternative to a full rectification hearing.

Rectification proceedings often go hand in hand with questions of construction. Depending upon the nature of the error, there may be arguments available to construe a particular rule in line with administrative practice without the need to rectify.

Approaches to dealing with issues that arise



The starting point is to consider carefully the issue that the scheme is facing. Is it possible to construe the provisions in a helpful way? If that seems possible, an opinion from a QC can lend credibility to a trustee's decision to continue to administer in line with what may appear to be erroneous rules.

Even if construction arguments are not clear cut, if you have the basis of a rectification argument you may be able to proceed in line with the construction but gather witness evidence and documentation that would assist a rectification action as an “insurance policy”.

Ultimately, only a court application will give certainty, but there may be variations to this in appropriate cases which balance the need for trustees to act in line with their duties and the commercial pressures to keep the costs of such correction exercises to a minimum.

Round up

ICO update

The ICO has been kept busy recently, dealing with the implications of the *Schrems II* judgment, updating its post-Brexit guidance, and [consulting on guidance](#) on the regulation and enforcement of data protection legislation.

It has also now published detailed [guidance](#) for organisations on how to deal with rights of access to personal data (subject access rights) under the GDPR, following its December 2019 consultation. The guidance provides clarification on when the complexity of a request allows an extended response period, when a request may be deemed “manifestly excessive”, and what fees can be included when charging for excessive, unfounded or repeat requests.

We are aware of DSARs being used improperly by claimants. Trustees should be prepared to carry out proportionate and reasonable searches, but be alert to numerous or repetitive requests and “fishing expeditions” aimed at obtaining documents generally rather than a member’s personal data.



Listen to our [recent podcast](#) to hear the team discuss DSARs, and speak to our team if your scheme is receiving such requests.

Transfers and scams update

Transfers and scams are perennial hot topics. And with the full financial impact of the COVID-19 pandemic still to materialise, it is likely that they will remain under the spotlight in the year ahead.

Under changes proposed by the [Pension Schemes Bill](#) aimed at preventing scams, trustees will be prevented from making a statutory transfer of a member’s benefits unless prescribed conditions are met. These conditions will be set out in regulations to follow, but are set to include providing trustees “with information or evidence about the member’s employment or place of residence”, and evidence that the member has obtained information or guidance from a prescribed person.

In terms of DC savings, the Government also recently [confirmed](#) that “new information requirements” will be introduced for members from age fifty “that will inform them in more simplified terms, about their retirement options and the availability of guidance to help with their decisions”. It plans to commence relevant sections of the Financial Guidance and Claims Act 2018, which ensure members have either taken guidance or actively opted out of it, “at the earliest opportunity”. A consultation on draft regulations is expected imminently.

TPR has launched its [latest campaign to combat pension scams](#). Supported by PSIG, it calls on the industry to pledge to combat scams, educate themselves about current and emerging scam tactics, and adopt best practice in transfer due diligence. Schemes are urged to ensure savers can spot the warning signs of a scam and are informed of any risks when they seek to transfer. A new TPR interactive training module outlines the processes it expects all trustees and providers to follow. While it remains to be seen how the industry responds, it is likely to result in schemes being encouraged to “make the pledge” and to be seen to do so.

Contact

Our market leading pensions & investment litigation team is consistently ranked in the top tier by both Chambers UK and the Legal 500. Our “respected team of pension litigators” (Chambers UK 2020) is experienced in handling cases before TPR, the High Court and TPO, and acts for both claimants and respondents in all forms of pensions and investment 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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They have shown the greatest readiness to engage closely with the client’s concerns and have been masters of their brief

Chambers UK 2020



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Recent publications



Sackers [Quarterly briefing – December 2020](#) highlights significant developments in pensions, covering key areas such as pensions reform, regulatory developments, new legislation and cases

Sackers [Finance & investment briefing – December 2020](#) takes a look at current issues of interest to pension scheme investors