

Pensions litigation briefing

June 2022

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



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Abbreviations

ERS: Early resolution service

ESG: Environmental, social and corporate governance

FA04: Finance Act 2004

IDRP: Internal dispute resolution procedure

PPF: Pension Protection Fund

TPAS: The Pensions Advisory Service

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

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Overview

“With summer around the corner, there is a fresh sense of a return to something like business as “what used to be” normal in the pensions world prior to the past couple of years. There has been a raft of publicity in the last few months on the new powers given to TPR in the regulation of the industry but we actually take the opportunity on page 3 to look at the here and now, and pause to see what TPR’s recent activity looks like.

In our recent pension litigation seminar we provided an update on recent rulings relevant to pension scheme trustees and administrators. We have shared just a few of the highlights relating to trustee discretions and the interpretation of scheme rules and set out some takeaway tips on pages 4 to 6.

A key issue we’re seeing is the length of time to obtain formal rulings from TPO, with 30% of cases taking over 12 months. The early resolution service of TPO is aimed at plugging some of the workload and we include some helpful reminders of this service on page 7 as to what it does and why members might be encouraged to make use of it to resolve their complaints more quickly.

I’d like to wish you an enjoyable summer and look forward to seeing more of you over the coming months.”



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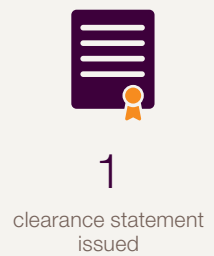
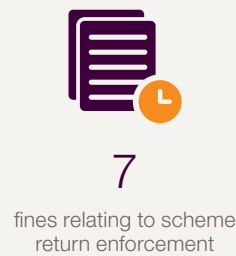
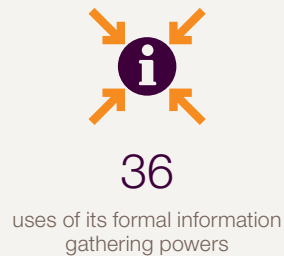
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TPR: enforcement in action

With TPR's powers increasingly in the spotlight, we've taken a look at what TPR has been up to over recent times.

TPR recent enforcement activity

During the period July to December 2021:



Source: TPR's [Compliance and enforcement bulletin July to December 2021](#)

TPR has been flexing its muscles



TPR has successfully used its anti-avoidance powers in relation to a management buy-out back in 2013 of an engineering business from its German parent company. The buy-out resulted in the employers being unable to support the pension scheme. Eight months later, the employers went into administration and the scheme entered into an assessment period with the PPF.

Following warning notices issued in March 2019, TPR issued a contribution notice to the former parent company for over £2 million, consisting of a sum of nearly £1.5 million plus an additional amount of just over £650,000 for lost investment returns and interest, representing the first time TPR has awarded an additional sum for lost investment returns to a scheme. TPR's investigations also led to a settlement of around £130,000 with a key individual.

The pandemic is no excuse for non-compliance!



There has been a spate of appeals in the press recently against penalties awarded by TPR against employers for failures to comply with its notices. Employers have used the pandemic and not having received items in the post from TPR as excuses for not having addressed issues raised by TPR. Unsurprisingly the tribunal hearing their appeals has not been persuaded.

What approach should you take with TPR?



It is a good discipline to consider whether a formal or informal approach to TPR is appropriate. For instance, there will be some situations where it is more helpful to pick up the telephone and have a conversation, rather than going straight in with a formal written communication.

Whatever approach you decide to take, being proactive will always put you on the front foot.

Seminar highlights: trustee discretions

We spoke at our recent seminar about a range of recent decisions regarding the exercise of discretions in respect of both death benefit lump sums and dependant's pensions. This article sets out some of the key points coming out of that seminar.

If you missed our seminar, you can watch our webinar on the same issues, available [on our website](#).

Exercising discretions – key principles to remember



- ✓ Check what your scheme rules say
- ✓ Understand the scope and purpose of the discretion
- ✓ Carry out a proper range of investigations and assessment of the facts
- ✓ Take relevant considerations into account
- ✓ Ignore irrelevant considerations
- ✓ Make a rational decision in good faith
- ✓ Keep an appropriate record of the decision



The deceased member's wishes are not paramount

A trustee's role is not to give effect to the wishes of the deceased, whether expressed through a form or not. Trustees should make their own decision having weighed the claims of all potentially entitled beneficiaries at the date of the decision. While the wishes of the deceased are a relevant factor, they are not the only factor that trustees should be taking into account.



Record keeping and giving reasons for decisions

Trustees should record the decision-making process at the time the decision is made, including reasons for the decision as well as the decision itself, and keep copies of any communications issued to the potential beneficiaries involved.

There is a body of decisions from TPO confirming that a failure to give any reasons for a decision to a complainant amounts to maladministration. Trustees need to demonstrate the rationale for their decision, setting out factors that have been taken into account. It will be difficult to evidence that all relevant factors, and no irrelevant factors, were considered when making the decision, if the decision-making process was not properly recorded at the time the decision was made.



Conflicts

In considering whether a trustee board or committee is conflicted when exercising a discretion, TPO will consider the provisions in the scheme rules that enables trustees to act and to make decisions even if a conflict arises in the exercise of a discretion. In addition, he will expect trustees to have an appropriate conflicts policy in place, which is followed by the trustees, and to have an understanding of TPR's guidance on managing conflicts.



What is TPO's role?

TPO's role is not to say whether or not he agrees with a trustee decision. His role is to consider whether the procedure that the trustees followed in reaching their decision was reasonable having properly considered the evidence. TPO will not substitute his own decision for that of the trustees and, if upholding a complaint, will remit it back to the trustees to exercise their discretion properly.

Seminar highlights: trustee discretions cont.

Looking at discretions beyond death benefit decisions

The core principles for exercising discretion apply to other areas of trustee decision-making:

Discretionary increases to pensions in payment

This is an area that we expect will generate interest in the coming months (and potentially years) as pensioners struggle with the steep rise in the cost of living and become more reliant on discretionary pension increases being granted by employers or trustees.

Investment decisions

Discretion is a core part of investment decision-making and there is a likelihood of increasing member scrutiny of the decisions made in the context of ESG issues in particular. Matters such as record keeping, following a reasonable (and documented) process for making decision and managing conflicts will apply to the exercise of discretions in relation to investment decisions.

Forfeiture of benefit

The specific scheme rules that set out whether and how benefits may be forfeited can be complex to interpret and differ widely from scheme to scheme. This is likely to be fertile territory for complaints from members whose benefits are not paid following a decision, or the failure to make a decision, that results in them being forfeited.

A note on financial dependency – the *Benge* case



This **recent case** served as a helpful reminder of the Court's consideration of the meaning and application of the age old phrase, dependent on the deceased member "for all or any of the necessities of life".

The High Court confirmed the view expressed in previous case law that it is not sufficient if a person was "merely deriving benefit from the earnings of the deceased", they must be to some extent dependent on the member. However, it also held that the term was not so narrow as to require dependency only on basic necessities such as shelter, food, medicine, clothing and so on.

In order to get the balance right, trustees have to look closely at the particular circumstances of the dependency, taking into account factors such as the dependant's social status, position in life and the way of life they were accustomed to on account of their reliance on the financial support of the deceased member. Although in many cases the relationship is in practice based more than just on financial support, there is nothing in the dependency definition that requires anyone to prove that they were in a romantic relationship with the deceased.

Based on the specific rules and facts of the case, the Court accepted the argument that mere cohabitation and the payment of expenses from a joint account are not sufficient to demonstrate dependency. However, it was necessary to take account of the personal status and standard of living provided for the surviving partner while the member was alive.

The deceased member and surviving partner were joint owners of two expensive properties, and while the partner was working and had her own pension income (to afford basic necessities), in light of her financial status in life for which she had relied on the member, she was able to show that she could not have afforded to maintain their homes without the deceased member's support. She was, therefore, dependent within the specific rule and within the FA04 definition and it was a permissible exercise of discretion for the trustees to decide to pay her a dependant's pension.

The case is also noteworthy as the trustees themselves went to Court for a ruling to approve their decision, in the interests of finality and certainty, before implementing their decision.

Seminar highlights: interpreting scheme rules

As well as trustee discretions, we also looked at some recent case law in our seminar, where the Court has been asked to assist trustees and employers in understanding the meaning and scope of their scheme rules. This process of interpreting drafting in documents is known as construction.

Key points from recent case law



- ✓ The Court will construe the exact wording of the particular provision in the scheme rules in question, with little weight being given to similar provisions considered in previous case law ([Atos IT Services UK Limited v Atos Pension Schemes Limited](#), High Court, 27 January 2020)
- ✓ When construing a provision, the Court will take account of both the purpose of the pension scheme, as well as the wider factual matrix ([Britvic plc v Britvic Pensions Limited & Anr](#), Court of Appeal, 10 June 2021)



Can construction help if there is a mistake in the scheme rules?

Generally speaking, where there is a mistake in the scheme rules, the parties will need to go to Court to try to rectify the document. Construction has sometimes been used as an alternative means of trying to correct mistakes, ie altering or adding words to a provision to “construe” it in line with the parties’ intentions. However, using construction in this way is not a silver bullet and we haven’t seen this successfully argued in a pensions context yet.

What is rectification?

Rectification is an equitable doctrine by which the Court has a discretion to alter the terms of a legal document where it does not accurately record the intention of the maker or makers of the document, so that the document conforms with the true intentions of the parties.



Going to Court – procedural changes

It is vitally important to follow the correct procedure when going to Court. Failure to follow the correct procedure can have costs consequences and even lead to contempt of Court. We have seen a number of cases where this has arisen over the last few years and parties have been penalised for not having done what they are required to do.

Over the last year or so there have been procedural changes regarding the preservation of documents and witness statements that it is important to be aware of.

1. Preservation of documents

Whilst there has always been a requirement to preserve documents, parties must now take the following steps:

- ensure that any destruction procedures in place in relation to relevant documentation have been stopped
- make contact with any individuals who may hold relevant documents to ask that they take steps to preserve them (this includes former employees/trustees)
- provide written confirmation to the Court that the above steps have been carried out.

2. Witness statements

The Courts have recently taken steps to ensure that witness statements are an accurate reflection of the witness’s own knowledge and recollection. This has taken a number of forms, including that a party must now keep a written record of anything that was shown or referred to a witness when the witness statement was being prepared. This is to show the extent to which documentation could have influenced the witness statement.

TPO: early resolution service (ERS)

What is the ERS?

The ERS was introduced back in April 2018, when TPO took over the dispute resolution function previously carried out by TPAS. The role of the ERS is to provide a quicker and more cost-effective way of dealing with less complex complaints by:

- giving parties “a steer on the position”
- facilitating meaningful discussions
- assisting applicants with the IDR process if necessary.

The ERS has recently published a [useful factsheet](#) about its services.

Who can use the ERS?

The ERS has the same “scope” as TPO, so typically will consider complaints by members about the way the scheme is run, decision-making by trustees or managers, or errors in information given or benefits paid.

Although an applicant must have raised the complaint informally before they use the ERS, they do not need to have completed the IDR.

What happens if a member goes to the ERS?

The case is assigned to a caseworker who advises the individual on the merits of their case. This may involve the caseworker engaging with both parties to get more information. However, the caseworker cannot require trustees to speak to or share information with it and either party can decide to stop using the ERS at any time.

If the caseworker considers more should be done by the trustees, they will help the individual present the outstanding issue(s) to the trustees and will work with both parties to see if an informal resolution is possible.

What are the possible outcomes?

Any informal resolutions reached are not binding on the parties unless they decide to enter into a binding settlement agreement. If a resolution is reached, the case is closed.

If a resolution is not reached or either party decides to stop using the ERS, the complaint is passed to TPO's adjudication team for formal investigation. The complaint will need to satisfy the conditions for formal investigation before this can begin, so the applicant may need to complete the IDR, for example.

Could the ERS process affect any TPO investigation?

TPO has stated that “any attempt to resolve a complaint during the ERS process, such as one party making an offer to the other, will not... be treated as an admission of wrongdoing or weakness in the other party's position”.

TPO has said it will not take into account the outcome of the ERS in any subsequent investigation. However, facts confirmed during the ERS process will be taken into account.

Trustee action

Although trustees are not required to tell members about the ERS, they might still consider it useful to signpost members to the ERS, perhaps in the IDR or at the point any complaint is made, as using the ERS could result in time and cost savings for both parties.

Contact

Our market leading pensions litigation team is highly ranked by both Legal 500 and Chambers UK. Our “first class” team of pension litigators (The Legal 500, 2022) is experienced in handling cases before TPR, the High Court and TPO, and acts for both claimants and respondents in all forms of pensions 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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