

## Pensions litigation briefing

December 2023

Sackers' pensions 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

**DWP:** Department for Work and Pensions

**IDRP:** Internal dispute resolution procedure

**TPO:** The Pensions Ombudsman

**TPR:** The Pensions Regulator

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## Overview

“Welcome to the latest edition of our Pensions Litigation briefing.

December’s naturally a time for reflecting on the year and it has been a busy and interesting one again. In the Courts, cases have scrutinised the validity of pension trust deeds and deeds of amendment, and TPO, having had to deal with its own cyber incident earlier in the year, brought an appeal to the Court of Appeal regarding its statutory remit and powers. TPO also gave its first determination considering the practical application of the 2021 transfer regulations, which we look at on page 7.

From a Sackers’ perspective, we would like to thank all of you who attended our Pensions Litigation webinar in October where we looked at member complaints across a number of different topics, recent TPO decisions and practical takeaways from them. The likely levels of busyness for TPO and interest in the decisions he makes shows no sign of letting up in 2024.

In this briefing we summarise some of the main points coming out of the webinar, focussing on the handling of member complaints and the various issues arising in the context of member transfer cases.

We hope you have a wonderful Christmas and New Year, and can suitably rest and recharge!”



**Arshad Khan**

Senior Counsel, pensions litigation

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

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# Complaints and TPO

## Complaints are on the rise

In our work over 2023, we have seen an increase in member complaints across our clients – both at an initial stage to the trustees and in the number that are being referred to TPO. Expectations of levels of service and turnaround times, as well as financial demands on members in difficult economic times, are likely to be reasons behind this overall increase.

TPO's annual report isn't expected until the end of the year but it will be interesting to see its statistics on the volume of complaints it is handling, particularly as we are aware of lengthy delays in TPO dealing with complaints.

### Top tips for dealing with complaints



- ✓ **Take each complaint seriously** – behind the email or letter is a real person who is genuinely asking for an answer to a question or a solution to an issue
- ✓ **Understand the issue** – a five minute call to check you have properly understood the underlying complaint or questions posed can help clarify the member's concerns more quickly and easily than a lengthy written request for information and subsequent exchanges of letters
- ✓ **Don't be overly combative** – a complaint is not a fight and the member may have sound reasons for pursuing it
- ✓ **Avoid delay** – ask any questions promptly and keep the member informed about how long it may take to make a decision
- ✓ **Pay attention to detail** – you don't want to compound the error or upset felt by the member by making additional errors in the handling of the complaint. For example, if a misquote has happened and there is a need to give the member a correct quote, make sure you take the time and trouble to ensure the information you are giving them is correct.

Also, remember to consider whether the underlying issue affects other members or groups of members. By taking into account the wider scope of an issue you can spot an administrative problem or oversight that can be corrected rather than risking further errors building up over time.

### The Pensions Ombudsman v CMG Pension Trustees Limited and CGI IT UK Limited (Court of Appeal, 1 November 2023)



It is unusual for pensions cases to go to the Court of Appeal so it is noteworthy that in a recent judgment, the Court of Appeal has found that TPO is not a “competent court” for the purposes of enforcing the recoupment of an overpayment.

The legislation permits trustees to recoup overpayments provided certain conditions are met including, where there is a dispute as to the amount, the deduction must not be made unless the obligation “has become enforceable under an order of a competent court”. Where TPO has determined a dispute about an overpayment, the Court decided that TPO is not a “competent court” and that a County Court order is needed to enforce TPO's decision if the member refuses to repay voluntarily.

” **Comment:** This case adds a layer of complexity to the process for recouping overpayments, with trustees potentially needing to go the extra step of requesting TPO's determination or direction is made enforceable by the County Court. This extra step is, however, a routine one and gives a clear route for trustees to get a formal decision that enables them to recoup an overpayment with legal certainty even in the face of a member that refuses to accept TPO's determination.



# Complaints: historic transfers

TPO has determined a number of complaints recently regarding the standard of due diligence carried out on historic transfers. These typically arise where members have unfortunately fallen victim to a pension scam and no longer have access to their funds.

Members often seek reinstatement of the benefits in the transferring scheme or substantial financial compensation referable to the transfer value paid on the grounds that they wouldn't have transferred out if proper checks had been undertaken and warnings given. However, trustees should be reassured that decisions to reinstate benefits are rare. We have only seen one published TPO decision awarding reinstatement in the last 12 months.

## How to approach complaints about transfers

While every complaint must be looked at on its own facts, there are some key factors to bear in mind:

- the date of the transfer, which will determine the industry standards at the time
- whether the member was sent the “Scorpion leaflet” or otherwise warned of the risks and signs of fraud
- whether the trustee recommended the member take regulated financial advice before making a decision
- the terms of any discharge signed by the member when requesting payment of the transfer value
- whether the transfer was statutory or non-statutory, and whether the trustee had any discretion to allow the transfer to proceed.

## Recent cases

### Teachers' Pension Scheme (PO-26616)



TPO reinstated the member's pension in the scheme. He found that the scheme had failed to follow TPR's “Action Pack” (the industry guidance in force at the time) when it considered the transfer request back in 2013. When other pension providers declined similar transfer requests from the member around the same time, the member did not challenge this – suggesting that, if the scheme had raised concerns of fraud, they would likely not have proceeded with the transfer.

### Debenhams Pension Savings Plan (CAS-43847-P7M0)

The complaint was not upheld because the scheme had followed industry guidance at the time and had issued the member a copy of TPR's “Scorpion leaflet” which warned him of the signs of fraud. Although a copy of the leaflet hadn't been scanned to the member's file, TPO decided (based on the scheme's standard practices at the time) that it would, on the balance of probabilities, have been sent.

### Lloyd's Bank Personal Pension Plan (CAS-50392-S0T8)

TPO found that the administrator's due diligence had been insufficient, in particular because it had not sent the member a copy of the “Scorpion leaflet”. However, he did not uphold the complaint because the member had received the leaflet separately from other pension providers around the same time, so a further copy would not have changed their decision to proceed with the transfer.

## Key takeaways

- TPO decisions to reinstate benefits in a transferring scheme are rare
- TPO will assess due diligence by reference to industry standards at the time of the transfer, not with the benefit of hindsight.

# Complaints: transfer delays

TPO has seen numerous complaints relating to delays incurred during the processing of a member's pension transfer, from the initial request for a transfer value quotation up to the payment of the transfer value.

These delays may result in financial loss to the member, either due to a member's transfer value reducing or because the investment returns the member would have received from the receiving scheme are greater than those in the transferring scheme, which the funds were held in longer due to the delay. Due to fluctuating market conditions, minor delays may result in significant reductions in members' fund values and so expose trustees to greater risk.

## What does TPO consider when investigating transfer complaints?



The cause of the delay (who caused it and why)



The reasonableness of the delay in the circumstances



Any financial loss resulting from the delay



Whether the member has suffered non-financial injustice

## Reasonableness

The time it takes to carry out procedural steps and to assess the information provided by a member will vary from case to case. TPO typically makes decisions about whether the time or steps taken by a trustee or administrator were reasonable by reference to service level standards and industry practice generally at the time relevant to the specific complaint.

### Legal & General Group UK Senior Pension Scheme (CAS 43568-Q2N2)



This complaint related to the time taken for the scheme to complete due diligence checks and ask the member further questions, which took around 12 days. However, the member had previously been informed that this would take around five to ten days. TPO did not uphold the complaint, as he considered the checks carried out were reasonable, were carried out quickly enough and it was necessary to ask further questions of the member.

### Aviva Personal Pension Plan (CAS-51069-J3T4)

The member complained that the scheme took too long to send the transfer value documentation requested. While the trustee believed that the documentation had been provided the same day of the request, the member did not receive it until two months later. TPO did not uphold this complaint, as the member did not inform the scheme that they had not received any information regarding their transfer value and it was therefore reasonable for the trustee to believe it had provided the requested information.

## ⚙️ Key takeaways

- Manage expectations and summarise the key procedural steps and timings when acknowledging the member's request for a transfer value statement
- If the calculation is unusually complex or further information is needed from other parties, eg an employer or actuary, keep the member updated.

## Complaints: transfer delays cont.

### Financial Loss

Delays may not always result in financial loss, as a member's transfer value may increase during the time of the delay or the transferring scheme's investment returns may be greater than the receiving scheme. However, in cases where financial loss has been incurred, the calculation of financial loss will vary depending on the circumstances, and TPO can determine compensation as he sees fit, as shown in the following decisions.

#### AJ Bell Youinvest SIPP (CAS-43661-G4N2)



The member's complaint was against the receiving scheme, who had requested the incorrect transfer value from the transferring scheme and did not request the correct transfer value until three days later. TPO considered that the error was unreasonable and resulted in a drop in the member's fund value which would not have happened had the error not occurred. Accordingly, TPO upheld the complaint and directed the scheme to pay to the member the difference (if higher) between the transfer value on the date it should have completed (three days earlier) compared to the date it had completed.

#### Gala Coffee and Tea Group Pension Scheme (CAS-56752-R2J6)

The member complained that the trustee had taken around six months to refer the member's transfer request to its administrator. TPO determined that the trustee had acted unreasonably and should have referred the request to the administrator within one working week. TPO upheld the complaint and directed the scheme to pay the difference (if higher) to the member between the amount of the tax-free lump sum taken once the transfer had in fact taken place compared to the amount of the tax-free lump sum she could have taken around six months earlier, plus the difference between the notional value of the member's funds once the transfer was completed (minus the lump sum) compared to the notional value of the funds six months earlier.

### Redress for non-financial injustice

Redress for non-financial injustice (often referred to as distress and inconvenience) may be awarded by TPO for maladministration in his determination of any type of pension complaint, including transfer delay complaints. This can be awarded both where financial compensation has been determined as payable by TPO, but also in cases where no financial loss has been caused.

TPO's guidance explains how much redress for non-financial injustice may be awarded depending on the severity of the non-financial injustice, as follows:

Nominal non-financial injustice:  <b>no award</b>	Significant non-financial injustice:  <b>£500</b>	Serious non-financial injustice:  <b>£1,000</b>	Severe non-financial injustice:  <b>£2,000</b>	Exceptional cases of non- financial injustice:  <b>over £2,000</b>
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#### ⚙️ Key takeaways

- During the IDR process, consider whether non-financial injustice has been caused, even when the complaint is otherwise not upheld, and the level of award that TPO may expect to be offered to the member
- Remember, even if an error was made or something went wrong, it is not obligatory to offer an award for distress and inconvenience if none has been caused.

# Pension transfers update

## Transfer regulations 2021

Regulations came into force on 30 November 2021, which introduced significant changes to the statutory transfer regime, with the aim of empowering trustees to stop suspicious transfers.

By way of reminder, the transfer regulations introduced red and amber “flags”. Red flags prevent a statutory transfer from going ahead. Amber flags require trustees to pause the transfer process and refer the member to MoneyHelper for guidance.

## DWP report

The DWP issued a report earlier in the year on its review of the transfer regulations. The report’s findings included:

- feedback suggests that certain provisions in the regulations, namely the incentives and overseas investments flags, are causing delays
- to date, TPO has received a relatively small number of complaints about the transfer conditions, mostly concerning transfers blocked due to a red flag.

Given that the incentives and overseas investments flags appear to be causing issues in practice, the DWP is carrying out further work with the pensions industry and TPR to consider possible changes to the regulations to “improve the pension transfer experience, without undermining the policy intent”.

As we have recently had TPO’s first determination in respect of the overseas investment flag (see box below), it will be interesting to see if this strengthens the calls for the regulations to be amended.

### Mr W – overseas investment amber flag



TPO has dismissed a complaint from a member that his transfer request had been unnecessarily delayed as a result of the trustee requiring him to seek MoneyHelper guidance.

Under the transfer regulations, certain conditions have to be satisfied before a statutory transfer can go ahead. Where an “amber flag” is present, the member must take MoneyHelper guidance before the transfer can proceed. For example, an amber flag is present when there are overseas investments present in the receiving scheme. However, the wording of the overseas investment amber flag is broader than intended resulting in inconsistency in how it is applied. Some schemes have identified an amber flag in most, if not all, cases where they consider an overseas investment is present, while others have taken an alternative approach where the level of perceived risk is low.

The trustee had decided, based on its due diligence of the receiving scheme, that an “overseas investments” amber flag was present, requiring the member to obtain guidance. The member complained that the trustee did not correctly interpret the transfer regulations, causing the transfer request to be unnecessarily delayed resulting in loss (a reduction in the transfer value), financial hardship and a delay to retirement plans.

TPO decided that the trustee had acted “reasonably” in determining that an amber flag was present but did not go so far as suggesting that a MoneyHelper appointment would be required in all similar cases.

**” Comment:** This decision is likely to make pension trustees more careful about permitting a transfer to proceed without raising an amber flag, even if the receiving scheme shows no sign of being a scam.

However, if the legislation is amended to refine the statutory wording to focus more directly on preventing scams or high-risk overseas investments, the approach taken by trustees may need to adapt to speed up the process for members transferring to UK-regulated personal pension arrangements with well-known and substantial industry providers which happen to offer funds which include global markets.

## Contact

Our market leading pensions litigation team is highly ranked by both Legal 500 and Chambers UK. Our team of pension litigators provides “first-class advice” (Chambers & Partners, 2024) and 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.



**Peter Murphy**  
Partner  
D +44 20 7615 9568  
E [peter.murphy@sackers.com](mailto:peter.murphy@sackers.com)



**Arshad Khan**  
Senior Counsel  
D +44 20 7615 9563  
E [arshad.khan@sackers.com](mailto:arshad.khan@sackers.com)



**James Bingham**  
Partner  
D +44 20 7615 9597  
E [james.bingham@sackers.com](mailto:james.bingham@sackers.com)



**Amy Difford**  
Senior Associate  
D +44 20 7615 9039  
E [amy.difford@sackers.com](mailto:amy.difford@sackers.com)



**Sarah Donnan**  
Associate  
D +44 20 7615 9592  
E [sarah.donnan@sackers.com](mailto:sarah.donnan@sackers.com)



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