

## Pensions litigation briefing

May 2025

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

**DWP:** Department for Work and Pensions

**GMP:** Guaranteed minimum pension

**TPO:** The Pensions Ombudsman

**TPR:** The Pensions Regulator

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## Overview

“Having completed his first full year as TPO it is fair to say it has been an eventful one for Dominic Harris. As well as having issued TPO’s annual report for 2023/24 late last year, he is currently embarking on a “root and branch” review of TPO’s operating model to ensure that it can allocate resources effectively. We discuss his performance and summarise a couple of interesting decisions in our TPO update over the page.

The professional trustee industry has been under TPR’s spotlight recently, with TPR proposing a regulatory framework for its oversight of professional trustees. TPR says it will first gather evidence from all of the professional trustee firms to better understand their businesses, the risks and opportunities that arise and any conflict issues. We discuss this more on page 5.

With the Government’s proposals on DB surplus expected any day now, we take a look at a recent case where trustees applied to the Court for help with making the most of a scheme’s surplus on pages 5 and 6.

Finally, readers may be aware of a monster of a pensions case that was heard in the High Court over six weeks early this spring. When the judgment comes out later in the year, it is likely to be of wide practical importance to the industry across a number of different topic areas, including expanding on the *Virgin Media* case. At that time we will be able to say more, so watch this space!”



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# TPO update

## Cyber incident impacted TPO work

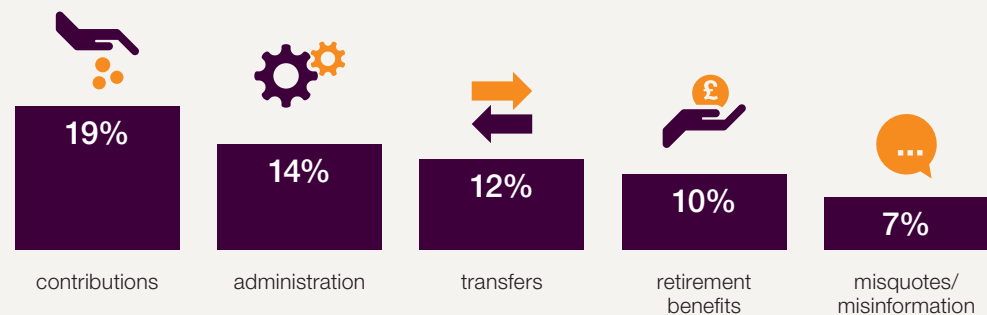
TPO published its [annual report and accounts](#) for 2023/24 in October last year. The report covers Dominic Harris' first full year in post, which has been an “eventful” one.

As a result of the “challenges” faced by TPO, the number of closed cases reduced from 7,784 in 2022/23 to 6,634 in 2023/24. This is due to a number of factors – the impact of a cyber incident, market challenges in recruiting and retaining skilled staff, and the number of complex cases in the historical caseload.

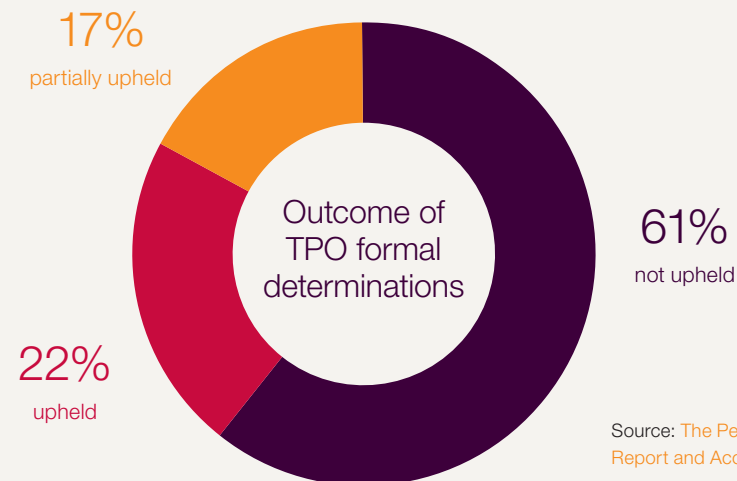
The number of complaints TPO received last year also dropped, but were still 9% higher than 2021/22, and the long-term trend of a growing number of complaints with an increased level of complexity is still projected to continue.

## What do the complaints relate to?

As in recent years, the top five issues have remained the same:



Source: Subject matter of closed pension complaints (top 5), from [The Pensions Ombudsman Annual Report and Accounts 2023/24](#)



Source: [The Pensions Ombudsman Annual Report and Accounts 2023/24](#)

## Time taken to resolve complaints

TPO closed 82% of pension complaints within 18 months of the complaint being validated, which is better than its target of 65%. However, the position was not as positive for longer duration complaints – with the number of active pensions complaints aged over 18 months increasing by 23%.

A significant number of the oldest cases are those regarding complaints about the recovery of overpaid pension benefits, with over 50% being more than three years old. These cases were impacted by a Court of Appeal ruling that TPO was not a “competent court” for purposes of concluding overpayment disputes where recoupment is sought.

## Increase in complaints aged over 18 months

## Recent determinations



### Mr N (CAS-71351-P8X2)

TPO partially upheld a complaint relating to, among other things, the timing and communication of a trustee's GMP equalisation and rectification project.

On the facts, TPO's view was that the scheme's equalisation project had not, at that point, been unreasonably delayed. However, as the trustee had proactively agreed to keep Mr N updated on the progress of the GMP equalisation project but had failed to do so, TPO awarded Mr N £500 for distress and inconvenience.

#### ” Comment

This case highlights the importance of good communication, especially where trustees have agreed to keep a member updated on progress. It is nevertheless reassuring to see TPO acknowledging that GMP equalisation and rectification projects are difficult and complicated and take a reasonable period to implement.

### Mr H (CAS-50353-Y4X5)

TPO upheld a complaint against an employer and a trustee for their respective failures to provide “mirror” benefits to a member following his transfer to a new scheme, despite pre-transfer commitments to do so.

On the facts, TPO's view was that there was an enforceable contract between Mr H and his new employer to procure that he was offered membership of the new scheme on terms mirroring his previous scheme. TPO found that the employer was responsible for maladministration and a breach of law for failing to provide and to document these benefits (and then seeking to avoid them once the error had been discovered). TPO also found that there was a breach of trust by the trustee for failing to grant Mr H the promised benefits in the new scheme.

#### ” Comment

TPO's decision highlights that promises given to members can become contractual entitlements even if the governing documents of the scheme are never amended. If promises are given to members about benefits during a transfer process, these should be clearly documented to avoid future confusion over the members' entitlement.

## Looking to the future

TPO published its [corporate plan](#) for 2024/25, which sets out its current priorities, including:

- ✓ reducing waiting times to a sustainable level
- ✓ reducing the number of older complex cases from the historical caseload
- ✓ improving signposting and information so that TPO receives the “right” complaints
- ✓ securing Ministerial approval for the long-term funding of the pensions dishonesty unit.

As well as focusing on the above, TPO is embarking on a “root and branch” review of its Operating Model to ensure that it can allocate resources effectively. It is also due to have a Public Bodies Review, which, together with the outcome of a scheduled spending review, will allow TPO to develop a longer-term, three-year plan.

**TPO to develop a longer-term plan**



# Professional trustees

## TPR to oversee professional trustees

TPR is introducing a framework for the oversight of professional trustee firms. It is “formally extending” its oversight following evidence gathering with 11 of the biggest professional trustee firms to understand their businesses, the risks and opportunities that arise and any conflict issues. It has identified several potential risk areas, including:

Relationships with employers

Profit and remuneration model

Sole trusteeship

In-house advisers

Scheme decision maker

A number of specific insights were mentioned by TPR, including:

- professional trustee firms that provide additional services (including secretariat and administration services) gain opportunities for efficiencies and value for money but also garner risks of conflicts of interest which need to be managed
- several firms are recruiting extensively to fill the expected future demand for professional trustees, enabling more schemes to access professional trustees if they wish to do so, which brings professional standards and entry criteria for new hires into sharp focus
- professional trustee firms will be told later in the year what TPR’s expectations will be and what steps it expects firms to implement.

Its Market Oversight team intends to establish ongoing supervisory relationships with professional trustee firms from summer 2025 with the intention to cover all firms by the end of the year.

# Surplus

## Government plans to lift restrictions on use of surplus

The pensions industry has been abuzz with talk of surplus following the Government’s announcement in January 2025 that it plans to lift restrictions on how well-funded, occupational DB schemes that are “performing well” will be able to invest their surplus funds. This follows the [DWP consultation](#) in 2024, which considered proposals to make it easier to make payments from scheme surplus to sponsors and scheme members.

TPR has confirmed its support for the proposals “where schemes are fully funded and there are protections in place for members”. What those protections will be and how the test for repayments will be structured will be key.

### Are there surpluses in DB schemes?



TPR’s data<sup>1</sup> shows that, as at 30 September 2024, the overall aggregate funding of DB schemes saw:

**82%**

in surplus on their technical provisions basis

**75%**

on a low dependency basis

**49%**

on a buy-out basis

<sup>1</sup> [Estimated DB scheme universe funding splits and assets under management](#), The Pensions Regulator (27 January 2025)

### Using surplus

Whilst we await details from the Government, some employers and trustees are already exploring the existing mechanisms to allow the release of trapped surplus. However, unlocking surplus is currently a complex process, particularly if pension schemes' rules limit the trustees' and employers' powers. This can mean that either surplus extraction isn't possible for some schemes, and for others, they may have to apply to Court to unlock surplus.

#### Arcadia case



In the recent case of *Arcadia Group Pension Trust Ltd v Smith* [2025] EWHC 11 (Ch), the trustee of the Staff Scheme sought to amend its scheme rules to permit a merger with the underfunded Executive Scheme. The Executive Scheme was a separate scheme but operated with the Staff Scheme as "sister schemes", with a material overlap in the composition of their boards of directors, the same administrators and professional advisers, and a joint investment and funding committee.

Following the collapse of the principal employer of the schemes, it became clear that the Staff Scheme could cover 100% of its liabilities (calculated on a buy-out basis) and would have a surplus but the Executive Scheme would be in deficit. However, if the schemes merged, the Staff Scheme's surplus could be utilised to fund the Executive Scheme's outstanding liabilities with some surplus remaining.

On this basis, the trustees of the schemes decided in principle to exercise a bulk transfer from the Executive Scheme to the Staff Scheme. Accordingly, the trustee of the Staff Scheme asked the Court to consider:

- whether it could amend the scheme rules, so as to give itself power to accept a bulk transfer from the Executive Scheme
- if this would be a proper exercise of the trustee's powers on the basis that adding new members to the Staff Scheme would reduce the surplus which could be used to augment benefits for existing members, and
- whether the trustee's decision to merge the schemes had been properly reached, including whether conflicts of interests had been appropriately managed and if relevant factors had been considered and irrelevant factors ignored.

The Court confirmed that the trustee of the Staff Scheme could amend the scheme rules as proposed and approved the exercise of the amendment power as well as the in-principle decision to merge the schemes.

This case is a good example of how "thinking outside the box" might assist trustees and employers to utilise surplus and shows the Court's willingness to agree, when appropriate, to trustees taking action to use surplus, including by utilising or amending scheme rules.

### What next?

Details of the Government's surplus policy will be included in the DWP's response to its DB options consultation, which is expected to be published in the "spring". It's possible that measures around surplus will be included in the Pensions Schemes Bill, which is due before Parliament's summer recess.

# Virgin Media (section 37 confirmations)

Last year, the Court of Appeal confirmed that a written actuarial confirmation (a “section 37 confirmation”) was required in respect of schemes that were contracted-out on a DB basis on or after 6 April 1997, where an alteration to a scheme’s rules affected certain pension benefits attributable to past or future service benefits. Without such a confirmation, the amendment would be void.

## What is happening now?

A case was heard by the High Court earlier this year, which considered (among other matters) various issues around the impact of failing to obtain a section 37 confirmation. These included what elements of pension actually fall within the scope of section 37, what might count as an “alteration” and whether, as a matter of principle, it is open to the Court to treat a section 37 compliant confirmation as having been given in certain circumstances (eg when the next actuarial valuation report after the date of alteration confirmed that the scheme continued to meet the reference scheme test). However, the judgment is not expected for some time. Sackers acted for the Representative Beneficiary in the case.

Away from the courts, and acknowledging the potential impact on affected schemes, the DWP is “actively considering” its next steps, including whether regulations should be made to retrospectively validate any amendments held to be void in light of the *Virgin Media* case.

**Sackers acted  
in another case  
considering section  
37 issues**

### Dealing with auditors



The sponsoring employer (and its auditors) and scheme auditors are likely to ask trustees whether any reviews of scheme documents have been carried out in light of the ruling.

The ICAEW has published [guidance](#), which is primarily aimed at sponsoring employers and their auditors but “may be of use” to trustees. This identifies three approaches that most trustees are considering:

- a wait-and-see approach
- an information-gathering approach, or
- performing a detailed analysis.

Whilst the guidance doesn’t change the legal position of trustees, it helpfully recognises that there are valid reasons for adopting each approach, and that the appropriate course of action will depend on the specific circumstances of each scheme.

## What does this mean for trustees?

Our view is that the *Virgin Media* decision doesn’t expose pension schemes to any new risks. Whether a section 37 confirmation was given is part of the wider question of whether all the necessary formalities (eg execution requirements, section 67 certificate) were satisfied when a scheme amendment was made.

At this stage, given these uncertainties, the steps trustees should take will depend on their scheme’s specific circumstances. This is something that they should discuss with their advisers.

**Trustees should speak  
to their advisers**

## Contact

Our market leading pensions litigation team is highly ranked by both Legal 500 and Chambers UK. Our team of pension litigators has a “deep understanding of the market” (Legal 500, 2025) 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.



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