

ALLEN & OVERY

Pensions in Dispute

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Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenoverly.com.

Scheme administrator liable for negligent misstatement: *Corsham*

The High Court has [held](#) a scheme administrator liable for negligent misstatement after it sent letters to members with protected pension ages referring to tax-free lump sums, even though it was aware that the members were due to start post-retirement employment in circumstances where their protected pension ages would be lost. Here, the scheme administrator (for tax purposes) was also the post-retirement employer – it should have realised the tax consequences; the disclaimers in the letters were not sufficient.

However, the Court refused to hold that the employer had breached a duty of care in tort to provide information to members about rights arising under an employment relationship, holding instead that it ‘would be a major and unjustified extension’ of that duty to hold that there was a duty to advise, inform or warn the members of the tax consequences of their decision.

You can read more about the decision in this [blog post](#).

What does this ruling mean?

The case is a reminder for trustees and administrators to ensure that:

- information provided in member communications is accurate (and not misleading);
- there are appropriate disclaimers in communications; and
- special care is taken around the retirement of members with tax protections/special pensions promises.

Standard communications may need to be reviewed in light of a scheme’s particular circumstances (for example, a common practice of post-retirement employment of members and a member population with protected pension ages), taking legal advice where appropriate.

Buyout: member should have been informed of impact on transfer request

A member has been awarded GBP1,000 compensation because he was not told about the impact of a buyout process on his transfer request ([PO-15840](#)).

In early 2015, Mr N requested a transfer quote which was sent in mid-April. As a result of a bulk annuity purchase at the end of April, the scheme’s transfer value basis was changed (existing quotations were still honoured). Mr N did not return the paperwork on time and the guarantee period expired.

The trustee provided a non-statutory quote in November 2015. After a complaint by Mr N, this was guaranteed until 26 January 2016. The buyout process was completed on 31 December 2015 and nullified all open transfers, but Mr N was not informed of this. Mr N again failed to return the paperwork in time, and was later told that the process had nullified the quote and the guarantee did not apply. He was sent a revised, lower quote and completed the transfer but complained. The administrator offered GBP1,000 as a goodwill gesture.

The administrator was ordered to pay GBP1,000 compensation for managing Mr N’s expectations poorly (including failing to inform him of the impact of the buyout). The Adjudicator felt that it would have been reasonable, if Mr N had met the deadline, to honour the guaranteed value despite the buyout.

What does this ruling mean?

Trustees planning or completing a buy-in/buyout should consider the impact of these processes on members who are considering transferring out, and communicate appropriately. Although there was no obligation to compensate Mr N for financial loss, the failure to inform the member in this case was considered to have caused distress and inconvenience.



Pension liberation: administrator not liable for making transfer

The Pensions Ombudsman (TPO) has dismissed a complaint by a member who lost most of his pension funds after transferring to a pension liberation vehicle ([PO-21243](#)) – he complained about insufficient due diligence by his pension provider.

Mr R had asked his provider in 2012 about accessing his pension, and was told this was not possible until age 55. Mr R said he stated that he had been approached by a company that said it would release part of his funds after a transfer. He was later issued a transfer pack and submitted his transfer request in February 2013, including signed discharge forms and proof of HMRC registration. This was shortly after the Pensions Regulator (TPR) had [launched](#) its Scorpion campaign.

TPO's practice in these cases is to judge conduct against industry standards at the time; here he noted that it was reasonable to allow a short period of time for TPR's guidance to be considered and implemented. The Adjudicator also considered that even if Mr R had been given the Scorpion leaflet, he would have proceeded with the transfer (in the hope of accessing some funds).

TPO found no evidence the provider was aware of any particular concerns about the receiving scheme, and did not accept that it should have realised the risk from the earlier phone call. There were no explicit dangers with the transfer, which was processed by a different team. TPO also assumed that procedures at the time would not have required the transfers team to review earlier calls to the call centre. There was no maladministration.

What does this ruling mean?

The case may be useful where complaints are received about transfers processed shortly after the release of TPR's guidance. It is a useful illustration of TPR's expectations in that period, and confirms that a short implementation period is acceptable.

Pension scams are also a hot topic at the moment, with the re-launch of the ScamSmart campaign over the summer, and a new version of the Code on Pension Scams. Trustees and administrators should ensure they keep up to date with industry practice in this area.

Watch this space

- Changes are expected to TPO's processes following a consultation about the operation of the Early Resolution Service and other matters. In its [response](#), the government supports an early resolution function for TPO as an additional option, subject to certain safeguards to preserve impartiality and avoid conflicts of interest.
- The Court of Justice of the European Union's decision in [Safeway v Newton](#) is pending (an equalisation case).
- ITV reportedly intends to apply to the Supreme Court for permission to appeal the [latest Box Clever decision](#), after losing its appeal in Court of Appeal.
- The Supreme Court has refused permission to appeal in the [McCloud/Sargeant](#) litigation (in which transitional protections on scheme closure were held to be unlawfully discriminatory). The government has [announced](#) that it intends to remedy differences in treatment across public service schemes.



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Jason is a Counsel in the Litigation group. He specialises in all aspects of pensions disputes, including advising clients in relation to internal disputes and disputes before the Pensions Ombudsman, the Financial Ombudsman Service, the Pensions Regulator, the PPF Ombudsman and the Courts. The Chambers & Partners Directory includes quotes from clients that Jason is 'an extremely unflappable presence on challenging projects' and 'provides technically complex advice in a calm and straightforward manner'.

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