



# Pensions Ombudsman Update

AUTUMN 2024

For what comes next

[tlt.com](http://tlt.com)



# Contents

We have reviewed a selection of the latest releases from The Pensions Ombudsman (TPO) and beyond, pulling out useful pointers for all pension scheme stakeholders.

<b>Our ‘Key case’ review updates you on some recent headline cases .....</b>	<b>1</b>
<b>The ‘Spotlight’ continues to shine on overpayments, with an update from TPO and a further noteworthy Determination.....</b>	<b>2</b>
<b>What to watch out for: where does TPO think future complaints will arise? .....</b>	<b>3</b>
<b>Finally, ‘Take three’ examines three recent complaints about delays .....</b>	<b>4</b>
Plus	
<b>Ombudsman news round up .....</b>	<b>5</b>





# Key case round up

## A number of interesting pensions-related judgments have been published in recent weeks.

Two key cases had their appeals heard over the summer:

### Virgin Media:

In **Virgin Media Ltd v NTL Pension Trustees II Ltd**, the Court of Appeal upheld the High Court's 2023 decision, which means that certain amendments to DB contracted-out scheme rules (including public sector schemes), if made without the required actuarial confirmation, could be invalid.

No further appeal is to be made in Virgin, although we understand that a case to be heard in February 2025 will consider some related issues. We are taking part in the industry's ongoing conversation with the DWP about a potential legislative solution.

Schemes will need to consider the impact of this judgment on any deeds or amending instruments which were executed between 1997–2016. This may be a pressing issue for schemes currently contemplating a bulk annuity transaction in the short to medium term. See our Insight for a brief summary of the case, its implications, and practical next steps – and speak to us to understand what it could mean for you.

### BBC:

The Court of Appeal also dismissed the appeal in the case of **BBC v BBC Pension Trust Limited**, which considered restrictions in the scheme's power of amendment, in the context of a cost-cutting proposal. The Court upheld the decision that a proviso to the amendment rule protected changes to future service benefits (and salary linkage – albeit subject to the BBC's discretion to determine what counted as pensionable for these purposes).

As ever with interpretation cases, the precise wording (and context of that wording) in each scheme's rules is vital. The Court again focussed on 'the words which the drafter has chosen to use', attaching less weight to the factual background. Unusually, the power in the BBC rules referenced active members' 'interests' – so its impact may be limited to those schemes with similar wording. If you are concerned by similar wording in your scheme – or have any other questions related to amendment powers, speak to your TLT contact.

Further appeals have been allowed and rejected:

### Data breaches:

Our last edition mentioned the data breach case of **Farley (formerly CR) and others v Paymaster (1836) Ltd**, in which the High Court had struck out claims, holding that the misdirected post (marked 'private and confidential') had generally not been opened and read. The Court of Appeal has, however, **now granted permission to appeal**, agreeing that the applicants have a tenable case for a cause of action of compensation for distress caused by infringement of their data protection rights – independent of whether that personal data was actually accessed by a third party. The appeal is likely to examine what constitutes 'data processing' and when it takes place, so should be watched keenly.

The case remains a salutary reminder to keep member data up to date; to ensure correspondence is as secure as possible; and to comply with data obligations (including those set by the ICO and TPR), taking prompt steps to minimise and report any breaches that come to light.

### Public sector:

The Fire Brigades Union (FBU) has been refused (on 22 July) **permission to appeal** to the Supreme Court in relation to the Government's proposed method of paying for McCloud age discrimination remedy costs. (The FBU and British Medical Association's judicial review of the method was earlier dismissed by the High Court in 2023, and again by the Court of Appeal in April 2024).

For more on McCloud and Public Sector pensions issues more widely, see our **TLT's Public Sector pensions updates**.



The case remains a salutary reminder to keep member data up to date; to ensure correspondence is as secure as possible; and to comply with data obligations...'



# Spotlight – where are we on overpayments?

## History in brief:

- In November 2023, the Court of Appeal confirmed the High Court’s decision in CMG Pension Trustees Limited: where a member disputes the amount of recoupment of an overpayment (with a scheme reducing future pension instalments to reclaim the money), no deduction can be exercised unless the obligation ‘has become enforceable under an order of a competent court’. And specifically, following the decision in Burgess v BIC UK Ltd, TPO was not itself a ‘competent court’ for these purposes.
- Therefore, where an overpayment is disputed by a member, trustees must currently apply to the County Court to enforce a TPO recoupment Determination. Failure to do so is a breach of law and could constitute maladministration. See our [March Update](#) for further detail on the procedural steps now needed.
- In our [July Update](#), we examined the case of Mr E, and set out key action points for schemes considering overpayments, including exploring a member’s available defences, and setting fair (and case-dependant) recovery periods.

## And now:

- The King’s Speech in July **confirmed that the planned Pensions Schemes Bill** will reaffirm TPO as a ‘competent court’ in overpayment recovery cases.
- Until the Bill comes into effect, guidance contained in TPO’s [factsheet](#) should continue to be followed. This summarises the process (which TPO has worked to minimise) that trustees should follow to apply to the County Court.

- The factsheet also sets out guidance on managing overpayment disputes generally. It strongly encourages parties to work towards resolution and ‘a mutually satisfactory agreement’, and to ensure that all possible defences to the recovery of overpayments are raised and properly dealt with during IDRPs.
- The Pensions Schemes Bill is expected to be published in Spring next year. We would expect the guidance to be updated following this.
- A recent [blog](#) by TPO confirms that overpayment complaints remain a ‘clear area of interest’ for the industry. TPO states that it has been ‘encouraged by schemes’ open-mindedness to considering the defences to recovery as part of IDRPs, with some confirming that they are already reviewing their caseloads to assess whether defences might be successful.’ It notes what it feels is schemes’ ‘collective interest in delivering the right outcomes for pension scheme members and making sure that customers are treated fairly.’ **Schemes should take note of TPO’s messaging, and the direction of travel around overpayments, and work to ensure their own processes reflect TPO’s guidance and expectations.**

## A recent Determination:

**Mr G**<sup>1</sup> complained about his scheme’s attempt to recover an overpayment of a spouse’s benefit of over £44,000, which had arisen after he had remarried but not communicated this to the scheme. He argued that the administrator had not carried out reasonable diligence; that, had the scheme put a system in place for domestic members similar to the one it had for overseas members to inform the scheme of changes to their personal circumstances such as a remarriage, it would have known about the overpayment sooner. Because it had not, he argued he had a limitation defence.

TPO concluded that the administrator had acted with reasonable diligence when relying on explanations given at the point the pension came into payment and later reminders in annual newsletters to communicate the need for spouses to notify it of changes to their personal circumstances. A later change in its processes did not, in and of itself, mean that the earlier process was unreasonable. Therefore, recovery of the overpayment was not restricted by the Limitation Act and this part of the complaint was not upheld. The case does however highlight the need for schemes to keep their processes under review to make sure they remain fit for purpose (as the administrator had done in this case) – and to ensure that their data is as accurate as possible, and that members and beneficiaries are made clearly aware of their responsibility to notify changes in personal details and circumstances to schemes.

Importantly, TPO did find the administrator’s failure to properly analyse its discretion to recover the overpayment was sufficiently serious to amount to maladministration. In line with TPO’s stance discussed above, it should have ‘genuinely considered’ all Mr G’s potentially available defences at an early stage.



The case highlights the need for schemes to keep their processes under review to make sure they remain fit for purpose...’

<sup>1</sup> CAS-30170-T9C1



## What to watch out for: where are complaints coming from?

In its recent Corporate Plan (for more on this, see page 5), TPO reviews some of the areas that it thinks are likely to impact the complaints it receives. It's a useful reminder for schemes of tricky issues to watch out for, and topics that may give rise to increased complaints:

**Auto-enrolment** – with many employers now offering or administering pensions for the first time

**Pensions dashboards:** schemes are likely to face or discover issues in getting their data ready for the dashboards – and access to dashboards and readier access to information will lead to more people identifying problems and errors

The 'new' **transfers** regime (with ongoing debates about its suitability): while the legislation's additional conditions on a member's statutory right to transfer may reduce the number of pension liberation attempts, they are also likely to lead to an increase in member complaints about schemes blocking or delaying transfers

As schemes that do not demonstrate value for members are encouraged to **consolidate**, the buy ins, buy outs and winding ups that will follow are likely to identify issues that can give rise to complaints

**GMP equalisation:** schemes are still making changes, and TPO anticipates that these may result in challenges and complaints, especially where a person has transferred from another scheme in the past

The implementation of the **McCloud age discrimination judgment and remedy** (for more, see our Public sector newsletters) may lead to an increase in cases regarding immediate detriment and claims that the remedy is insufficient

**Scams** continue to be a major issue, especially in the current economic climate. Although TPO says that the volumes of complaints about scams is not high, the cases themselves are often extremely complex and resource intensive. TPO continues to work with partners across the industry to improve the sharing of data and intelligence

**Trustees and employers should pay particular attention to these areas, and consider where they may impact their schemes and what steps they can take to reduce their risks.**

Good governance standards, effective communication with members and beneficiaries, appropriate signposting of complaints processes and assistance available, and taking training and advice on tricky areas are all key.

### Other areas that continue to dominate TPO's frequent complaints lists include:



For more information or assistance on any of these areas, speak to us.



# Take three – three recent Determinations on Delay

Delay gives rise to numerous complaints in various contexts – delays in payments, in transfers, in implementation (for example, of pension sharing), and in providing information or responses. It is the subject of many varied TPO case studies, and is referenced in TPO’s factsheets on, for example, death benefits and ill health pensions.

Three recent Determinations have tackled the issue:

- **Mr D**

TPO **partly upheld a complaint** which featured a number of ‘unacceptable’ delays experienced by a member of the LGPS.

It is worth noting that when looking at the substantive complaint (that the setting up of the retirement benefits was delayed), TPO closely analysed the administrator’s stated service level agreements (SLAs) – although based on the timeline of events, the identified delays were not held to be material in this case. (This was also the case in the recent **Mr Y**.)

But while this part of the complaint was not upheld, delay was also a key feature in TPO’s assessment of the level of distress and inconvenience suffered in the case. TPO noted the administrator’s handling of the member’s complaint ‘fell woefully short’ of how it expects an IDRPs to be run – particularly given this complaint’s ‘straightforward’ nature. The scheme had also been made ‘sufficiently aware’ of Mr D’s health conditions, including how the lack of communication or update regarding his complaint impacted his physical and mental wellbeing during an already difficult time for him. In addition, TPO sent a number of requests to allow full investigation into the events complained about, but the administrator was slow to provide information and in places did not respond at all, including to the Adjudicator’s Opinion: a ‘particularly egregious’ failing. The attitude towards both Mr D and TPO demonstrated ‘a complete lack of empathy and compassion’. The severe distress and inconvenience caused by this maladministration was recognised in the award of £2,000.

- **Mrs S**

Mrs S **complained** that her scheme provided poor service following her death benefits claim and delayed payment of her spouse’s pension. TPO upheld the complaint, awarding £1,000 for the serious distress and inconvenience suffered. There had been several instances of delay and poor service amounting to maladministration – including the delay in making the payment (which far exceeded the scheme’s normal timeframes), a failure to confirm that there would be a delay in paying the benefits, and failure to update Mrs S with an estimated timescale despite her numerous chasers and complaints.

There was ‘no evidence of any urgency or empathy’ in dealing with Mrs S’s claim following her bereavement.

- **Mr L**

Mr L **complained** about the delay in the transfer of his NHS pension funds.

As TPO notes, it is important to note that simply meeting statutory timelines does not mean that there haven’t been unnecessary delays (and indeed ones that cause financial loss); in the same way, just because a member has incurred financial loss does not automatically mean that is due to excessive delay.

In this case, TPO found that the administrator twice failed to provide required documentation in a timely manner, which did cause unnecessary delays in the completion of his transfer, thereby exposing Mr L’s benefits to market volatility for longer than necessary.

The administrator was ordered to make good any financial loss it has caused Mr L, alongside a payment for the significant distress and inconvenience caused.

The cases highlight the importance of proper and timely complaints handling by schemes, as well as TPO’s expectations of how respondents should engage with it. Information should be provided in a timely fashion, with extensions only being granted in exceptional circumstances. Additional care should also be taken in cases where there may be factors to be taken into account such as ill health or bereavement.

Schemes should ensure their SLAs are reasonable and workable, that administrators adhere to them – and communicate promptly (with scheme and affected members) where they are unable to.



There was ‘no evidence of any urgency or empathy’...

## Ombudsman news:

### Changes to how TPO operates proposed:

TPO has published its [2024/25 Corporate Plan](#), which outlines key priorities for the year. Demand for its services still outstrips its capacity (with new incoming complaints currently 24% higher than forecast).

TPO will now implement a package of changes with the aim of transforming its service, including improvements to its signposting and the pre-application journey, with more self-service information, so that the 'right' complaints reach it. It will focus on better targeting its resources, earlier decision-making, and a streamlined approach to both the informal resolution and the formal determination of complaints.

Earlier this year (see our [July Update](#)) TPO promised changes tightening the conditions to investigate a complaint, requiring complainants to exhaust schemes' formal processes before approaching TPO. In a [July blog](#) since, TPO has expressed the view that 'the industry already shows an appetite for taking greater ownership of dispute resolution processes' – 'a real sense of eagerness to resolve complaints and disputes at the earliest opportunity'. **Schemes should ensure that they are acting in line with this.**

As well as understanding the forthcoming changes, **schemes should ensure they are aware of and using:**

- TPO's updated ['How we investigate complaints' factsheet](#). Among other changes, it removes reference to the Early Resolution Service and suggested timelines for resolution, and refers to caseworkers rather than Adjudicators (to align with the service changes mentioned above)
- up to date signposting. TPO's [refreshed signposting factsheet](#) provides wording that schemes can use to direct members to its services. Different forms of standard wording are given, including for use on websites and during complaint and resolution processes.

---

## Recent & forthcoming from TLT's Pensions team:

- See our ['Pensions – key issues for your trustee agendas – September 2024'](#) briefing for current hot topics and expected developments, with further detail on the governance implications of the [General Code](#), dashboards, and changes to the [DB funding regime](#).

[A new blog on TPO's Operating Model Review](#) reveals that it has successfully piloted and plans to roll out 'expedited decision-making' at the assessment and resolution stages of its 'customer journey'. This aims to speed up the resolution of complaints, without compromising on quality. The initial focus is on complaints that are assessed as having an obvious outcome (for example an incorrect benefit statement but which caused no loss, or an expired transfer value where the member was clearly responsible for not meeting the statutory time limits).

Expedited cases may not require significant correspondence with the parties so long as sufficient information is supplied in the application. An initial decision will be issued to all parties setting out the caseworker's view. Any party can ask for the matter to be referred on to an Ombudsman, who can issue a binding Determination if they agree with the caseworker. Parties will therefore be able to get a Determination without going through the current Adjudication process.

This should reduce waiting times and duplication in processes and provide shorter Determinations (similar to summary judgments). Closing cases more quickly will also allow TPO to focus resource on cases that require in-depth investigation. As expedited Determinations will not normally be published, TPO will explore how any industry-wide learnings can still be shared, for example through case studies or insights.

Expedited decision-making will be rolled out later this month. TPO will also consider how to use the approach to deliver informal resolutions in the future.

**Schemes should familiarise themselves with the proposals, and consider how the changes could impact their internal processes and member communications.**

- 
- For more detail of key developments for public sector schemes, see our ['What's coming up in pensions: public sector focus'](#) series.
  - Our [SIPP & SSAS round-up](#) covers ombudsman Determinations in relation to SIPPs and SSASs. These include cases on investment duties, transfers, due diligence, and delays, plus a look at how the ombudsmen address issues such as jurisdiction and their approach to determining cases.

# TLT's Pensions Litigation Team

**Pensions disputes have become a key issue for many employers and trustees. TLT's Pensions Dispute Resolution team are first and foremost pensions lawyers.**

We understand the issues facing companies and trustees, and provide clear and realistic solutions based on commercial and practical realities to help clients, whether employers or trustees, achieve the right result.

The team is experienced in dealing with complaints to the Pensions Ombudsman, acting on behalf of individuals as well as employers and trustees.

Disputes involving members and disputes between trustees and employers require careful handling and a pro-active approach.

Most disputes the team have been involved in have not become public knowledge as we pride ourselves on pro-active case management to resolve matters at an early stage, avoiding wherever possible the unwelcome cost exposure involved in full blown litigation.

[tlt.com](http://tlt.com)

## Contacts



**Sasha Butterworth**  
Partner and Head of Pensions  
t +44 (0)333 006 0228  
e [sasha.butterworth@TLT.com](mailto:sasha.butterworth@TLT.com)



**Chris Crighton**  
Partner  
t +44 (0)333 006 0498  
e [chris.crighton@TLT.com](mailto:chris.crighton@TLT.com)



**Edmund Fiddick**  
Partner  
t +44 (0)333 006 0208  
e [edmund.fiddick@TLT.com](mailto:edmund.fiddick@TLT.com)



**Victoria Mabbett**  
Partner  
t +44 (0)333 006 0386  
e [victoria.mabbett@TLT.com](mailto:victoria.mabbett@TLT.com)



Can be relied upon to give sound legal advice with a pragmatic approach and a keen eye on costs.

**Pensions: Dispute resolution, Legal 500**



[tlt.com/contact](https://tlt.com/contact)

**Belfast | Birmingham | Bristol | Edinburgh | Glasgow | London | Manchester | Piraeus**

TLT LLP and TLT NI LLP (a separate practice in Northern Ireland) operate under the TLT brand and are together known as 'TLT'.

Any reference in this communication or its attachments to 'TLT' is to be construed as a reference to the TLT entity based in the jurisdiction where the advice is being given. TLT LLP is a limited liability partnership registered in England & Wales number OC308658 whose registered office is at One Redcliff Street, Bristol, BS1 6TP. TLT LLP is authorised and regulated by the Solicitors Regulation Authority under ID 406297.

In Scotland TLT LLP is a multinational practice regulated by the Law Society of Scotland.

TLT (NI) LLP is a limited liability partnership registered in Northern Ireland under ref NC000856 whose registered office is at River House, 48–60 High Street, Belfast, BT1 2BE

TLT (NI) LLP is regulated by the Law Society of Northern Ireland under ref 9330.

TLT LLP is authorised and regulated by the Financial Conduct Authority under reference number FRN 780419. TLT (NI) LLP is authorised and regulated by the Financial Conduct Authority under reference number 807372. Details of our FCA permissions can be found on the Financial Services Register at <https://register.fca.org.uk>

