



# Pensions Ombudsman Update

DECEMBER 2023

For what comes next

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

In this edition, we look at two of TPO's 'feature' determinations – one on the hotly-debated transfers legislation, and the other on an 'exceptional' Pensions Dishonesty Unit case. Plus we look at whether a newsletter is an appropriate means of communicating scheme requirements.

Finally, we take a look at TPO's day in court in the *CMG* case – with its implications for schemes seeking to recoup overpayments.

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# Mr W – Raising of amber flag for overseas investment was reasonable

**TPO rejected a complaint that trustees had applied the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021 (the Regulations) incorrectly, delaying a transfer and causing financial loss.**

## Facts

In February 2022, Mr W requested a transfer from his occupational scheme to a personal pension plan (the Receiving Scheme). The trustee of his scheme (the Trustee) issued a questionnaire to Mr W as part of its due diligence on the transfer and the receiving scheme.

Mr W answered the questionnaire to the effect that his money would be invested in 'Global Funds', among others. The Trustee asked Mr W's financial advisor for input, who confirmed that investments included 'Global' funds which 'primarily invest[ed] in shares of smaller companies from developed countries around the world'. The Trustee decided that this raised an 'amber flag', and referred Mr W to MoneyHelper for a safeguarding appointment. Following attendance at this appointment, Mr W's funds were transferred, but his transfer value had by this point decreased.

Mr W complained that the Trustee had incorrectly interpreted the Regulations. He argued that, as the Receiving Scheme was HMRC-registered, had an FCA-authorized administrator, with funds governed by HMRC's restrictions on qualifying investments and managed by a UK-based and FCA-regulated fund manager, the Trustee should not have raised an amber flag, thereby delaying his transfer.

## Decision

TPO dismissed Mr W's complaint.

The Regulations provide that an amber flag is present where any overseas investments are 'included in' the receiving scheme; 'included in' is defined as 'investments that the receiving scheme will make with the member's pension

savings immediately after the transfer is made or is already making with the pension savings of other members of the receiving scheme'. 'Overseas investment' is not defined in the Regulations, but 'overseas' is defined as 'wholly or partly outside of the United Kingdom'. Taking all these together, it was not therefore necessary for the transferring member to be investing in any overseas investments themselves for an amber flag to be considered present.

As permitted under the Regulations, the Trustee then requested additional evidence on the transfer. The further information provided by Mr W's financial advisor, alongside the questionnaire, allowed the Trustee to reach an informed conclusion that overseas investments were 'included', and therefore to require Mr W to obtain guidance before transferring.

TPO noted that the wording of the Regulations and their intended application may not be aligned, but that a literal interpretation of the Regulations was not an unreasonable approach. It was reasonable for the Trustee to find that there were overseas investments in the Receiving Scheme, and to ask Mr W to take guidance. Accordingly, the Trustee's actions did not amount to maladministration, nor cause an unreasonable delay.

In relation to financial loss, although it was understandable that Mr W was aggrieved, fluctuations in transfer values were to be expected.

**The determination: Mr W (CAS-93568-H0D0)**

## Impact

The pensions industry remains divided on the application of the Regulations, and this determination highlights the misalignment between the wording of the legislation and the more permissive / pragmatic 'policy intent' that has been set out in subsequent DWP statements and Pensions Regulator (TPR) **guidance**. The DWP has now indicated that it will conduct further work with the pensions industry and TPR to consider if changes should be made to the transfer conditions to improve the process. Until that point, schemes are likely to continue to follow the letter of the law.

We note however that TPO's finding was that the Trustee's approach was 'reasonable' – and not that it was the only 'correct' solution. This does leave it open that a trustee finding in the opposite direction, so long as a good process was followed, might also be found to have acted 'reasonably'.

The thorough process the Trustee followed here influenced TPO's decision: it had reasonably identified a potential amber flag, made use of the powers granted under the Regulations to seek further evidence, and taken legal advice on the issue. This helped protect the Trustee against adverse findings against the performance of their duties.

Schemes should make sure affected members are made aware as early as possible of the likely need to take guidance, and work to avoid any avoidable delays in transfer timelines by keeping their processes up to scratch.

# Mr M & Mr Y – exceptional breaches and maladministration lead to trustee being ordered to pay over £730K

**After an extensive investigation carried out by the Pensions Dishonesty Unit, the Deputy Pensions Ombudsman (DPO) has upheld complaints against the trustee and administrator of the Focus Administration Pension Scheme (the Scheme).**

## Facts

Mr W was the sole trustee of the Scheme and the sole director and shareholder of Focus Administration Limited (Focus), the Scheme's sponsoring employer.

Between 2013 and 2017, 11 members including Mr M and Mr Y transferred approximately £830,000 into the Scheme. Their funds were invested into companies that had only been incorporated for a short period, had been trading at a loss, or were companies that Mr W's associates had interests in. The funds were also used to provide loans to unregulated finance companies as well as used in unregistered 'back-to-back' property transactions. Mr M lost nearly 50% of his savings, whilst Mr Y lost his entire pension due to the failed investments.

The complaints against Mr W included his failures to:

- comply with statutory requirements, guidance from TPR and governance requirements
- operate necessary controls to ensure effective transparency of the Scheme's administration
- comply with duties under statute and case law concerning Scheme investments.

In addition, Brambles Administration Limited (the Administrator) was accused among other things of having failed to appropriately respond to member concerns about their pension funds and refusing to provide the trustee's contact details.

## Decision

The DPO upheld the complaints against what it termed a sophisticated pension liberation arrangement. It found that that Mr W had committed multiple breaches of trust and maladministration, including failures to obtain proper written investment advice, consider the need for asset diversification (and liquidity), have in place an effective system of governance, and manage conflicts of interest. It directed Mr W to repay £738,768.60 into the Scheme as well as paying (together with the Administrator) £6,000 to each applicant in recognition of the exceptional distress and inconvenience suffered.

The DPO rejected Mr W's attempt to rely on his corporate identity to protect him from liability in relation to his role as the sole trustee-director of Focus. It was held that Mr W could not rely on the Scheme's exoneration clause as he did not genuinely believe the investments were in the members' best financial interests; as his beliefs about his duties and obligations were not held honestly and in good faith he was therefore not excused from a breach of trust.

In relation to the Administrator, the DPO found that it had committed exceptional maladministration in its attempts to limit communication between the members and trustee, its failure to maintain adequate records for nine years, its failure to seek audited accounts or arrange for a Chair's Statement to be issued, and its failure to report obvious irregularities to TPR.

**The determination: Mr M & Mr Y (CAS-27569-X0V0 & CAS-73885-Q6V9)**

## Impact

This case is another important reminder of the vital importance of good trusteeship and scheme governance, as well as mitigation of financial risk.

There was no evidence that Mr W had obtained regulated independent financial advice before investing the Scheme's funds. Trustees of schemes of any size should ensure that proper advice is obtained prior to making investment decisions, and that this advice is documented.

Additionally, although this is an extreme case, it is a reminder to schemes to regularly review and ensure there are safeguards in place to avoid poor scheme governance and administration. With TPR's General Code due to come into force in Spring 2024, excellent internal controls are more important than ever.

This case provides yet another warning of the risks posed by pension liberation schemes. High returns and early access can be very appealing to members, but almost always carry with them a much higher risk to investments resulting in the loss of some, if not all, of their pension. Here, the effect on the complainants' lives and wellbeing had been 'severely deleterious' and 'irreversible'. It is hoped that the transfer regulations discussed on page 1 work to limit the spread of scam schemes.

# Mrs S – reminder by newsletter was reasonable (while it worked)

**TPO partially upheld a complaint in relation to an overpayment – but held that information in newsletters can be sufficient to put individuals on notice of scheme requirements.**

## Facts

Mrs S's husband was a member of the Teachers' Pension Scheme (TPS); Mrs S received a widow's pension following his death. The rules of the TPS provided that widows' pensions should cease on remarriage. In 2016, TPS wrote to Mrs S during a check on beneficiaries' circumstances, at which point she informed them that she had remarried in 2004. TPS stopped her pension, and asked her to repay the overpaid amount as soon as possible.

The requirement for a spouse's pension to cease in such circumstances was not individually notified to recipients after their initial application for benefits, but was flagged in the yearly newsletters issued to all pensioners (as well as on its website).

Mrs S complained to TPO, claiming that she had acted in good faith. She argued that putting this requirement in a newsletter which may not be read was 'not sensible', and the fact that TPS needed to carry out its 2016 reconciliation showed that its approach had not worked. In addition, she found TPS's letters 'unnecessarily blunt and insensitive', which caused stress.

## Decision

TPO determined that TPS acted with 'reasonable diligence' by relying on newsletters to find out about the marital status of a member, even though it later decided to take a different approach to information-gathering. Use of newsletters in this manner was 'common practice', and 'in the absence of evidence that a system is not working', the approach was acceptable.

Mrs S had not established a legal defence against recovery of the overpayment. TPO found that she had not acted in good faith. Admitting that it was a 'finely balanced judgment', he found on the balance of probabilities that Mrs S would have read one or more newsletters. A change of position defence was therefore not available to her.

However, the complaint was nonetheless partly upheld, because of TPS's approach to recouping the large sum. In acting as if it was absolutely required to recover the

overpayment, TPS did not properly consider the discretion it had (both in terms of amount and period of recovery), and so its decision was not properly taken.

TPS was instructed to consider recovery afresh, and if it decides still to reclaim, it should consider what is an appropriate period for recovery having regard among other things to what hardship it may cause Mrs S. TPO recommended Mrs S provided TPS with details of her financial circumstances to assist with the decision.

## Impact

The determination is a useful reminder to schemes that may rely on newsletters to communicate important information. If this is their chosen method, they should try to make clear to members that this is their process, so that they are aware they need to read them – and ensure newsletters clearly highlight key information. They should also keep the effectiveness of the newsletter communications under review. (TPS changed its procedures from 2014, having found that a number of members had not told the scheme about certain changes. It now requires those in receipt of certain spouses' pensions to make an annual declaration regarding remarriage or cohabitation.)

The determination contains some further useful pointers:

- Schemes need to understand the extent of their discretions, and ensure they are taking decisions properly;

- Schemes should aim to agree a reasonable period for overpayment recovery between the parties;
- Generally this should be not less than the period over which the overpayment built up (but the financial circumstances of the individual might mean a different period is appropriate);
- Where repayment is requested by a scheme, it must notify the beneficiary of their ability to appeal the decision; and
- TPO notes that spouse's pensions are claimed 'at what is usually a very stressful time': schemes need to be alive to this, and ensure their processes and communications are timely, clear, and sensitive.

**The determination: Mrs S (CAS-13449-R1C9)**

# Recovery in overpayment cases – TPO is not a ‘competent court’

Our final report looks not at a TPO determination, but at a case that affects TPO itself, with implications for how schemes need to act going forwards.

The Court of Appeal has **found** that TPO is not a ‘competent court’ for the purposes of recouping overpayments. Where an overpayment is disputed by the member, trustees must now therefore apply to the County Court to enforce a TPO recoupment determination.

## Facts

In 2022, *CMG Pension Trustees Limited v CGI IT UK Limited* (High Court) considered trustees’ ability to reclaim overpaid benefits (by reducing future pension instalments). It examined section 91 of the Pensions Act 1995, which allows schemes to recoup overpayments if certain conditions are met. Amongst these, where a member disputes the amount, deductions must not be exercised unless the obligation in question ‘has become enforceable under an order of a competent court’ (or in consequence of an award of an arbitrator). The judge found that it would be sufficient for a ‘court of competent jurisdiction’ to make a declaration that a trustee was entitled to exercise its right of recoupment. However (following the decision in *Burgess v BIC UK Ltd*), TPO was not itself held to be a ‘competent court’ for these purposes.

TPO brought an appeal on that point, setting out why it believed it should be deemed a competent court.



The Court has no judicial role in this process.

## Decision

The Court of Appeal considered the meaning of ‘competent court’, taking into account factors including the nature and extent of TPO’s jurisdiction and its functions. It concluded that TPO is not comparable with a court for these purposes.

Therefore, where a member disputes the amount of an overpayment and brings a complaint to TPO, and TPO finds that the overpayment can be recouped, an order will need to be made by the County Court confirming the amount of the overpayment and the extent and rate of set-off before the scheme can make any deductions. It will not however be necessary to commence an action in the County Court or for that court to consider the merits of the matter and make its own order. The Court has no judicial role in this process – it does not rehear the case or pass judgment itself: enforcement is purely an administrative matter.

In practical terms, following a TPO determination allowing recoupment, the trustees should deliver a certified copy of that determination and order to the County Court. The County Court will then enforce it as if it had made the determination or direction itself.

If the member does not dispute the amount of an overpayment, no order is needed. Query if this judgment may then see trustees make more determined efforts to agree recoupment provisions with members upfront?

## Impact

While the outcome is understandable, it is not particularly helpful, adding as it does to administrative complexity (and, one assumes, time and cost) to little obvious benefit. However, it does settle a matter which has been in doubt now for some time.

TPO is currently reviewing its position, and will **provide an update shortly**.

We are aware that a small number of schemes have already been taking these steps. Where schemes haven’t, they will now need to remember to factor this step into their overpayment processes. It will be interesting to see how streamlined the County Court process can become – and whether the thought of the additional stage now required may add to trustees’ weighing up how and whether to pursue some overpayments at all...

**The determination: [The Pensions Ombudsman v CMG Pension Trustees Ltd & Anor \[2023\]](#)**

## Ombudsman news:

TPO has **concluded its investigations into the cyber incident** it fell victim to earlier in the year. It worked with the relevant agencies, including the National Cyber Security Centre, to respond to the incident, and contacted around 17,000 affected individuals. Its services have now been fully restored.

For practical advice on preparing for and handling cyber incidents and attacks, watch our Autumn **'Trustee Survival Guide 2023' webinar**.

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2024 TPO review will include Public Account Committee's (PAC) report recommendations in relation to the AEA Technology (AEAT) pension scheme.

The Pensions Minister, Paul Maynard, has said that next year's independent review of TPO will provide an opportunity to look at the recommendations to ensure pension savers make informed financial decisions, and have adequate routes of appeal.

The PAC's recommendations include actions for the government to:

- review the current rules for increasing the PPF compensation for inflation;
- ensure that members' complaints on the AEAT case can be adequately and independently reviewed;
- review TPO arrangements to ensure that all aspects of member interactions with their pension have an adequate route of appeal; and
- set out what it will do to support people to make informed pension decisions, including the changes it will make in light of the DWP's call for evidence and an update on the progress with Pensions Dashboards.

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

- See our **'Pensions – key issues for your trustee agendas – September 2023'** briefing for current hot topics and expected developments.
- 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 conflicts of interest, dispute management and decision making, and transfers, plus look at how ombudsmen and regulatory bodies address limitation periods, exercise of their powers, and compensation levels.
- Our recent **SIPP & SSAS Winter Festival** featured a session on complaints, addressing recent trends and tips to mitigate key risks – ask to watch again.

# 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.

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“They are the best pensions lawyers I have ever dealt with: they are responsive and practical,” says an impressed source.

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