



# Pensions Ombudsman Update

JULY 2024

For what comes next

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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.

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# Key case round up

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

## SIPPs/the Financial Ombudsman:

**The Court of Appeal has upheld FOS' decision** in the long-running Options UK Personal Pensions LLP (previously Carey Pensions) v FOS 'execution only' SIPP case. The appeal dismissed a claim for judicial review of FOS' decision, holding that the ombudsman's findings on SIPP operators' due diligence obligations were not irrational, that it had explained its reasoning adequately, and that it had been entitled to reach the conclusions it had.

The judgment explores FOS's remit, giving a useful reminder of its wide and flexible decision-making powers (in general terms, FOS is not required to determine a complaint in accordance with the common law – but is required to reach an opinion about what is fair and reasonable in the circumstances of the particular complaint). SIPP operators – and others subject to FOS' jurisdiction – should take note.

For more on the area generally, visit [TLT's SIPP & SSAS Hub](#).

## Public sector:

The Fire Brigades Union (FBU) is **seeking permission to appeal** to the Supreme Court in relation to the Government's proposed method of paying for the costs incurred by the McCloud ruling. (In brief, this deems the costs of remedying the discrimination in public sector schemes, following the unlawful age discrimination litigation, to be 'member costs' rather than 'employer costs').

The FBU and British Medical Association's judicial review of the method was dismissed by the High Court in 2023, which ruled in favour of HMT on all grounds. Their appeal was

then **dismissed by the Court of Appeal** in April 2024, which ruled that the Directions had not been made for an improper purpose, that HMT was not under an obligation to consult, that equality obligations had not been breached and that it was open to HMT to include McCloud remedy costs in the cost control mechanism as 'member costs'.

For more on McCloud and Public Sector pensions issues more widely, see our [TLT's Public Sector pensions updates](#).

## Data breaches:

Data breaches remains a hot topic, with household-name scheme attacks making the news in recent weeks. A recent case gives a salutary reminder as to the importance of pension communications being 'private and confidential'. In **Farley (formerly CR) and others v Paymaster (1836) Ltd**, the High Court struck out the majority of the claims brought by over 400 members against their scheme administrator, after annual benefit statements were sent to out-of-date addresses.

Crucially, the letters containing the benefit statements had been marked 'private and confidential', and featured a return address on the envelopes. The statements also contained only limited personal information on their first page. The court held that the statements generally would not have been opened and read. The judge stated that 'absent some facts that would compel a different conclusion, the Court will not draw the inference that a letter addressed to a named recipient, clearly marked 'private and confidential', will be opened by a third party who is not the named recipient...'. Only a handful of identified cases of opening were allowed to proceed.

The case is a useful reminder to keep member data up to date; to ensure correspondence is as secure as possible, and clearly marked as private; 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.



## Watch out for:

Two key cases had their appeals heard in June:

- **BBC v BBC Pension Trust Limited**, which considered the restrictions in the power of amendment in the scheme rules in the context of a cost-cutting proposal
- **Virgin Media v NTL Pensions Trustees II Limited**, after the High Court held certain amendments to DB contracted-out scheme rules' void if introduced without actuarial confirmation.

The outcomes are likely to have implications for other schemes. Follow us for updates as soon as the judgments are published.



# Spotlight – recovery of overpayments<sup>1</sup>

A recent TPO **determination** (in the case of Mr E) takes an extensive – and likely, influential – look at the recovery of overpayments. It is a detailed and useful analysis, comprehensively setting out TPO’s approach to recoupment and the availability of defences to it on the facts.

The complaint here related to an overpayment of more than £90,000 that had built up over 24 years, following benefit improvements that had subsequently been held to be invalid. The trustees sought to offset these overpayments against future pension payments, but TPO held that it was not equitable for the trustees to recoup the bulk of them.

## Key learning points for schemes

Trustees should consider reviewing their own overpayments processes in light of the recent determination and some of its key learning points:

- **Equitable?** Trustees have a duty to pay the correct benefits and seek to recover overpayments, but it may be inequitable for them to do so in a particular case; the individual member’s circumstances must be assessed. Here, Mr E had acted in good faith, and could not have known that he was not entitled to the amounts. TPO found (which is not often the case) that he had irreversibly relied on the overpayments to change his position. Past editions of our Update have addressed considerations on recovering overpayments and what schemes need to take into account when making their decisions.
  - Schemes should consider whether not pursuing recovery of an overpayment would favour that member over others. (Here, that was not the case, as the employer was required to fund any deficit that might arise).

- **Delay:** Trustees’ actions, once they became aware of a possible overpayment, must be timely. In this case, their delay meant that the defence of ‘laches’ was available to the member in relation to part of the payment, barring the trustees from seeking to reclaim for that period (which ran from the time they first became aware there might be potential claim (but delayed asserting a right to it), and not from the much later determination of the case).
- **Communications:** Trustees must properly and promptly explain overpayments to members; if not, they may be liable to pay damages for inconvenience and distress. Effective communications should give appropriate explanation and detail, including being clear as to the potential consequences. In this case, an early announcement was not worded clearly enough for a ‘lay pensioner’ to understand that overpayments were continuing to build up and may have to be repaid.
- **Defences:** Scheme should, during IDRPs, explore all possible defences that may be available to an overpaid member – even if they are not raised by the member (making allowance for the fact they are generally unrepresented).
  - TPO will accept ‘change of position’ and ‘estoppel’ defences in recoupment cases (even though they do not specifically apply to recoupment, he held that the principles considered by the courts in relation to both were of assistance when deciding whether it was reasonable and fair to allow recoupment).

- Estoppel by representation might be allowed in more cases than is commonly thought. Here, incorrect (and un-caveated) payslips and P60s amounted to unambiguous representations as to the level of pension which Mr E was entitled to receive, and he relied on them. Significantly, TPO concluded that the payment of the incorrect pension itself could, in some circumstances, also amount to an implied representation of entitlement to the pension payments.

- **Time periods:** overpayment recovery periods have generally been held to be appropriate when they are no shorter than the period over which the overpayments accrued. However, TPO suggests that where this might still lead to hardship, a longer period with lower reductions might be more fair.
- **CMG:** in accordance with CMG, trustees can currently only enforce the decision through the County Court process – failure to do so is a breach of law and could constitute maladministration (see our **March Ombudsman Update** for further detail on the additional procedural steps now needed and on TPO’s **guidance** on managing overpayment disputes).

We understand that complaints by other affected members are being considered by TPO, so it will be interesting to see if the same approach is taken in these, or indeed in other cases in the future.

**1 Mr E (CAS-55100-G3W9)**

# Retrospective amendment when equalising pensions was permitted<sup>2</sup>

A retrospective amendment of a scheme's rules to equalise the normal retirement date ('NRD') of male and female members at 65 has been held to be valid by TPO.

In Barber v Guardian Royal Exchange Assurance Group ('Barber'), the ECJ held that occupational pensions were pay for the purposes of equal treatment laws, and so different retirement ages for men and women (for pension purposes) was not permitted. Pensionable service prior to 17 May 1990 (the date of the decision) did not have to be equalised. It was further established that for the period between the judgment and when schemes equalised ('the Barber Window'), pension benefits had to be 'levelled up' – giving the disadvantaged members (usually the men, who generally had a retirement age of 65) the more favourable benefits (an age 60 NRD). For service after the Barber window, benefits could be 'levelled down' for all members (ie an age 65 NRD for all).



...equalisation continues to be a live issue for many DB schemes...

In this case, a scheme's rules were amended in November 1992 to equalise the NRD for men and women at age 65 (with a Barber window therefore of 17 May 1990 – 23 November 1992). The way in which equalisation was effected meant that female members' benefits were given an NRD of 65 for all periods of service, other than in respect of the benefits accrued during the Barber window period.

A member, Mrs E, complained when her benefits were reduced for early payment at age 64. She argued, based on case law, that the trustee was not allowed to increase her NRD retrospectively to age 65 for pre-17 May 1990 service. She also submitted that Section 67 of the Pensions Act 1995 ('Section 67') required the trustee to obtain member consent before implementing any amendments that might affect 'subsisting rights' under the scheme.

## Determination

TPO held that the scheme had achieved equalisation properly:

- the amendment power allowed retrospective amendments, and did not prohibit detrimental changes to accrued benefits
- the changes were made prior to Section 67 coming into effect, and did not have retrospective effect, so that legislation was not relevant to Mrs E's case, and member consent was not required to the amendment of her subsisting rights.

Mrs E argued that an earlier case (Safeway) had held that EU law prevented a scheme from equalising members' NRDs with retrospective effect unless there was objective justification. However, once the equal treatment provisions of the Pensions Act 1995 had come into force (1 January 1996), the question of whether retrospective equalisation was effective or not became an issue of domestic rather than EU law. Further, the Safeway case could be distinguished: it concerned the retrospective closing of the Barber window period, not amendments to benefits accrued before 17 May 1990.

As there was no evidence of breach of legislation or maladministration, TPO could not consider any financial loss – it amounted to a loss only of expectation for Mrs E. The complaint was not upheld.

## Comment

Although it has been over 30 years since the Barber judgment, equalisation continues to be a live issue for many DB schemes, with mistakes or omissions surfacing at key stages, such as preparation for buy out – introducing delays (and possibly, significant further liabilities) into the processes.

If your scheme is considering heading towards an end-game solution, it would be advisable to review your rules and amendments made over the years to confirm whether equalisation has been validly effected.



This is further evidence that equalisation cases will always be determined on their own merits. Whilst numerous principles have been developed over the years, making firm decisions on such an important area cannot be made without a rigorous examination of the relevant facts in each specific case. This case was unusual in that it contained an amendment power which did not prohibit retrospective amendments which reduced accrued rights, which many schemes do have baked into their rules. Ensure you take legal advice where your scheme has questions.

For more on equalisation and other tricky issues that may emerge at critical journey points, ask to watch our recent [webinar](#).

2 Mrs E (CAS-38639-F6P7)

# Take three – three recent determinations on incorrect information

Receiving incorrect information gives rise to many member complaints – so much so that TPO published a useful [factsheet](#) last year summarising the principles he will apply when determining complaints in this area.

The guidance is clear that the circumstances where TPO will require trustees to honour misinformation are limited. A member making such a claim will generally have to show that they received an unambiguous representation, on which they relied – in good faith and to their detriment. (Our [March 2024 Update](#) featured one such rare successful estoppel case, in relation to Ms E and a survivor's benefit.) Three recent determinations show the range of TPO's responses:

## • Professor G

Recently, TPO has upheld another significant case. **Professor G** was informed that he could remain a member and pay contributions to the NHS scheme on an exceptional basis when he had reached age 60 – but continuing membership of the scheme was not actually permitted under the regulations. This was negligent and amounted to a negligent statement / misrepresentation. The mistaken enrolment and prolonged poor administration also amounted to breaches of law, statutory duty and of the duty of care. TPO called the case 'particularly egregious'.

Whilst TPO acknowledged that holding the administrator to account ultimately had a cost to the taxpayer, he noted that schemes 'should not make ultra vires promises, and should have systems in place to ensure that this does not occur'.

The detailed determination provides a helpful overview of and TPO's perspective on the various potential causes of action. There are useful considerations for schemes on a variety of issues, including administration, negligence and negligent mis-statement, breach of contract, legitimate expectations and estoppel, limitation, human rights, and the approach to calculation of loss (including tax elements).

TPO ordered that Professor G should receive the promised benefits, and made a very significant award (£4,000) in addition for distress and inconvenience.



...schemes 'should not make ultra vires promises, and should have systems in place to ensure that this does not occur'.

## • Miss D

In the case of **Miss D**, although she had received incorrect information from the scheme in deferred benefit statements (that she was entitled to her benefits without an early payment reduction at age 60), these did not amount to negligent misstatement. Sensibly, the information had been caveated with a disclaimer, and was not stated to be guaranteed. The communications that had not been caveated were over 10 years before Miss D was taking significant financial decisions, and so she ought to have sought updated information; further, she did not mitigate her position in any way. In addition, had the complaint been upheld, Miss D would have received more benefits from the scheme than she was entitled to.

The complaint failed: TPO found that she had only suffered a loss of expectation, not an actual financial loss. TPO did however make an award for distress and

inconvenience of £1,000 (more than the scheme had initially offered), given the repeated errors made in its communication.

## • Mr S

**Mr S** has complained that his scheme changed the method for calculating early retirement pension benefits, and as a result, the benefits he was due to receive at age 55 were lower than the ones he had previously been quoted. He was again found only to have suffered a loss of expectation. As with Miss D, the information he had received was stated to be estimated and not guaranteed. TPO noted that members should not rely on emails to make serious financial decisions (in this case, to take redundancy), but instead, for example, 'prudently' request a formal retirement pack. Again, Mr S had not mitigated his position.

In this case, TPO actually awarded less for distress and inconvenience than the trustee had initially offered Mr S (£2,000), holding that an award of £1,000 was 'appropriate recognition'.

These determinations are a reminder to schemes to ensure that their information is accurate and clear – and appropriately caveated, of course. Among other things, TPR's updated General Code sets out the Regulator's expectations in relation to member communications.

Speak to us for more information – or for a review of your documents and communications.

## Ombudsman news:

### Changes to how TPO operates proposed:

TPO has **highlighted** plans to tackle its historical caseload and reduce waiting times – issues highlighted in the latest **Corporate Plan**. The proposals are part of an operating model review, and combine small day to day changes with ‘more revolutionary’ shifts in the way that TPO works.

Three areas will be prioritised:

- the conditions to investigate a complaint will be tightened. (A further **blog** on 18 June confirmed that TPO will be requiring all complainants to exhaust the respondent’s formal complaints process before it will consider investigating a complaint. The aim is to ‘empower schemes to resolve complaints without TPO input’ – and reduce TPO waiting times. Full implementation is expected by autumn this year. Volunteer advisers will continue to offer impartial support to individuals, with a focus on vulnerable members and cases, for example where the risk of financial harm is high or where there is a time-critical situation)
- the use of short-form decisions and determinations will be extended for appropriate cases at all stages of TPO’s processes. This should expedite decision-making and reduce the number of handovers between different teams
- exploring whether there are certain categories of complaint that are more appropriately dealt with by other organisations, and whether a de minimis threshold should apply in some circumstances.

The full programme of changes is to be delivered over three years, with a target of achieving an improved position over the next 12–18 months.

### TPO latest report and accounts and Corporate Plan:

TPO has noted to the WPC that resource limitations are impacting cases, with several large and complex Fraud Compensation Fund cases paused.

TPO noted that it was having to make ‘pragmatic decisions on which ones are most likely to get justice. For example, we will go after cases that set a particular type of precedent ... which ones we are most likely to get returns for the members on, which ones we are most likely to act as a deterrent on, and which ones show a new type of scam or a new way that we can deal with something.’

The **DWP has agreed to provide additional funding to TPO to help clear cases** generally – a further £1,050,000 has been allocated for the 2024/25 period, specifically for casework activities to reduce waiting times.

### Review of TPO awaited:

TPO is scheduled to have an independent arm’s-length body review in 2024. The aim of the review is to provide a ‘robust challenge’ on the governance, accountability, efficacy and efficiency of the ombudsman.

Following the Committee of Public Accounts’ recommendations, the government **agreed** to review ‘ombudsman arrangements to ensure that all aspects of people’s interactions with their pensions have an adequate route of appeal’. The target implementation date was set as Autumn 2024, but this may change in the wake of the General Election.

### Updated signposting guidance published:

TPO has updated its **factsheet** on signposting wording for schemes, and FCA-regulated businesses, to use. It includes referral wording for inclusion in communications with members, dispute and resolution processes, and on websites.

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

- See our **‘Pensions – key issues for your trustee agendas – May 2024’** briefing for current hot topics and expected developments, with further detail on the governance implications of the **General Code**, dashboards, implementing **Lifetime Allowance** changes, and forthcoming changes to the **DB funding regime**, covered in our Insights.
- 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.

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

**Pensions, Chambers**



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