



Pensions Ombudsman Update

MARCH 2024

For what comes next

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Contents

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

We first take a look at the ongoing implications of the *CMG* case – including TPO’s response to the judgment, and a determination impacted by it.

We then cover instances of incorrect information being given – in relation to death benefits, and a poorly described PIE.

Finally we look at a standalone case where a scheme tried to offset contributions it owed as a refund against contribution owed to it, but failed to make out sufficient connection between the two.

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Further update: Recovery in overpayment cases

Our **December edition** looked at the **CMG** case and its implications for how schemes need to act in relation to overpayments going forwards.

In *CMG*, the Court of Appeal **held** that TPO was not a ‘competent court’ for the purposes of recouping (by making deductions from future pension instalments) overpayments. Where an overpayment is disputed by the member, trustees must now therefore apply to the County Court to enforce a TPO recoupment determination.

New TPO Factsheet

TPO promised to review its position and provide an update. In late December it did so, publishing a **factsheet** explaining the effect of the *CMG* judgment, setting out guidance on managing overpayment disputes, and summarising the process that trustees should follow to apply to the County Court.

This notes that the County Court requirement (while a purely administrative step) presents an additional hurdle for trustees, members and TPO. The Ombudsman has therefore worked with stakeholders from across the sector in order to minimise the additional time and cost burden. To facilitate any necessary approach to the County Court, any relevant determination TPO makes will now set out a schedule of the amount and rate of recoupment, and when issuing the determination, the Ombudsman will also provide a certified copy of it for the County Court. The factsheet covers the detail of the application.

The factsheet also strongly encourages parties to work towards resolution, and to ensure that all possible defences to the recovery of overpayments are raised and properly dealt with during IDR. TPO anticipates that in the vast majority of cases, parties should be able to come to a

mutually satisfactory agreement either before or during the Ombudsman process, so there is no longer a dispute for TPO to formally determine.

Finally, the factsheet makes clear that the DWP intends to introduce legislation to formally empower TPO to bring an overpayment dispute to an end without the need for a County Court order. As the current position adds administrative complexity (and, one assumes, time and cost) to little obvious benefit, this will be welcome.

Determinations post-*CMG*

The mischief of the ‘clarified’ (albeit possibly temporary) position is illustrated by the recent determination of **Mr Y (CAS-39869-Q8J7)**. TPO here had to determine that a complaint should be partly upheld because the trustee in the case commenced the recovery of an overpayment without an order of a competent court.

Payments to Mr Y had been incorrect, and so the trustee acted correctly in seeking to recover them; in addition, Mr Y did not have any defence (including a change of position, estoppel or negligent misstatement) to the recovery. However, following *CMG*, TPO had to find that the trustee was wrong to recover the disputed overpayment by recoupment without first seeking a County Court order.

Trustees will be acting in breach of law – and can be found responsible for maladministration – if they fail to fulfil the requirements. There can be a breach of law without maladministration, and in this case, as the trustee had taken legal advice on the matter, TPO found that it was

not guilty of maladministration. But post *CMG*, a failure to seek a court order is likely to amount to both.

The determination also reminds us that a dispute over whether all or any part of the alleged overpayment is recoverable would still be considered a dispute as to the amount of the overpayment.

The trustee was ordered to repay the deducted monies and restore Mr Y’s pension to the unreduced level. However, importantly, it was not precluded from then taking steps to recover the money from Mr Y again (as long as the approach adopted is not ‘inequitable’ and is otherwise in accordance with the law).

Going forwards

Until the position is rectified, as TPO hopes it will be, by the DWP, we may see more determinations relating to the pre-*CMG* period where schemes have proceeded without court orders.

Schemes should ensure they study TPO’s factsheet carefully to understand the processes they need to be following – both in terms of taking the additional step of a court order should one be required, and during the consideration of an overpayment and any complaints raised about it to avoiding getting to a contested position in the first place.

See our earlier Ombudsman briefings for considerations on recovering overpayments and what schemes need to take into account when making their decisions.

Mr T – advice and information relating to a PIE was incorrect

TPO partly upheld a complaint about information provided as part of a Pension Increase Exchange (PIE) exercise. Mr T argued that it had not been made clear to him that different increases would apply to his pre and post 5 April 1988 GMP – which meant that his decision was based on incorrect information.

Facts

In 2016, Mr T received a personalised statement and information booklet, comprising the details of a PIE offer, from his employer. Mr T registered his interest in the PIE pension, based on the information received, but also opted to receive advice and guidance from Mercer (noting on the questionnaire sent in advance that he would likely accept the offer). In the advice session, he asked for clarification on some points relating to increases.

He subsequently accepted the PIE offer, but once in payment Mr T queried whether his increases were being calculated properly. The administrator responded, explaining that pre-88 GMPs do not receive increases, and apologising that the incorrect information had been given previously.

The trustee responded to Mr T's further complaint, noting that it was not responsible for the information provided as the PIE exercise had been run by the employer. Mercer acknowledged that the information it had given during the advice session was incomplete. However, it stated that the employer was responsible for that information. It also suggested that the correct information would not have altered the positive recommendation to take the offer, nor Mr T's inclination to do so.

The employer argued that the description of GMP increases within the offer was 'clearly a simplification'; as GMP rules were complex, and given the nature of the communication it was of the view that a degree of simplification was appropriate. In its view, the simplified text in the offer was not inaccurate: while there was a reference to increases

that 'may' be up to 3%, it did not think this would be automatically interpreted by most readers as suggesting that the full GMP would receive guaranteed increases of that amount.

Decision

TPO partly upheld the complaint, finding maladministration on the part of Mercer.

In the Ombudsman's view, the information regarding the split in GMP was not a crucial factor in Mr T's decision to accept the PIE pension. Further, Mr T was only entitled to the pension benefits that were payable under the rules of the scheme. The fact that the information he was provided lacked clarity did not entitle him to receive any increase on his pre-88 GMP. Mr T had not suffered a financial loss, so this element of the complaint was not upheld.

However, Mercer did not explain that a GMP is split different tranches, and that the pre-88 GMP would not increase. There was no reason for Mr T to conclude different increases should apply to different proportions, and when Mr T asked specific questions regarding the possible increases, he did not receive the correct information. This was maladministration.

Although the employer supplied the information regarding Mr T's pension details, TPO held that it would expect Mercer to be aware of how GMP operated. While the incorrect information did not impact Mr T's decision to accept the offer, he had suffered a loss of expectation. Mercer was ordered to pay £500 in recognition of the significant non-financial injustice it had caused.

Impact

The case is a salutary lesson for those giving advice on such exercises.

Communication of pensions can be difficult; it's a famously complex field. Employers, trustees and relevant third parties want to give members advice that is accurate and sufficient – but also understandable and not alienating. In the circumstances here, TPO did not find that there had been maladministration by the employer in providing simplified information. But there is a fine line between wording that is clear and plain-English, and wording that skims too much of the detail. It is always worth taking advice both on benefit structure, what detail needs to be covered and how that might best be done.

PIE exercises, although now perhaps waning in popularity, have been widely used in the past. In the current market, rising inflation may cause members to look back at whether any incentives they were offered proved good value – and on what information they based their decisions. We may see more complaints in these areas in coming years.

The determination: Mr T (CAS-35991-Q6G0)

Ms E – rare estoppel defence enforced

TPO has **upheld a complaint** in relation to death benefits. Ms E complained that her partner of 18 years, Mr N, was told she would receive a survivor's pension in the event of his death. It later transpired he had been misinformed.

Facts

Mr N was a member of the LGPS until April 1991. The LGPS is administered in accordance with the 1997 Regulations, which provided for a spouse's pension on death; they were subsequently amended to introduce a survivor's pension for un-married partners, but this provision was only applicable to members in active service on or after 1 April 2008.

In May 2017, Mr N contacted LPP's (the service provider) helpdesk to check whether Ms E would be entitled to a survivor's pension. He was advised that she would. Based on this information, they elected not to get married. After his death, Ms E applied for a survivor's pension but was turned down. Ms E complained. LPP wrote to acknowledge that the information it had provided during Mr N's telephone call was incorrect, and that the relevant member of staff had been retrained, and Ms E was offered £500 for distress and inconvenience. Ms E did not accept the offer and asked for her complaint to be escalated. She estimated that she had suffered a loss amounting to £34,000.

Decision

The complaint was upheld. TPO found that if LPP had not provided Mr N with incorrect information, it is more likely than not that he and Ms E would have married in order to guarantee her entitlement to a pension.

The interpretation of the regulations was correct – that is, Ms E was not entitled to a pension. However, during his telephone call, Mr N had been provided with a clear

and unambiguous statement concerning the eligibility criteria for a survivor's pension, which was inaccurate and misleading. LPP also missed several opportunities to make Mr N aware of the correct position. This was sufficiently serious to warrant a finding of maladministration.

TPO found Ms E's complaint met the necessary elements for a defence of estoppel by representation. In brief, to succeed in an estoppel argument, an applicant needs to establish that there was an unambiguous representation on which they relied in good faith to their detriment. Among other points, TPO found that Mr N was given the reasonable expectation that the scheme would provide Ms E with a pension on his death; he was not provided with any other information at the time that may have caused him to question the accuracy of the representation, nor was he signposted to scheme regulations or asked to read the scheme booklet. It was reasonably foreseeable he would rely and act on that information: that was his very reason for calling LPP. And there was clear evidence that Ms E and Mr N would, on the balance of probabilities, have married had the correct information been provided; testimonials were given from his children, ex-wife, and nurse to that effect.

Ms E was awarded the full pension she had been led to believe she would receive, plus interest. TPO also held that the maladministration compounded any distress Ms E was already suffering during a difficult time; consequently, she was also entitled to a £2,000 award in recognition of the severe distress and inconvenience.

Impact

It hardly needs repeating, but schemes must of course ensure the information that they give is accurate and not misleading, and that scheme and administrative staff should be appropriately trained to be able to discuss the benefits offered.

As we often note, schemes have a duty to act in accordance with their rules and relevant legislation, and while the provision of incorrect information can amount to maladministration, it does not, in of itself, confer an entitlement to different or greater benefits. So it is a rare case where an estoppel defence is made out. Here, Ms E had not raised an argument of estoppel. However, the case of *Grievson v Grievson* suggested that 'generous allowance must be made' for the fact that complainants to TPO are unrepresented. TPO therefore considered it necessary to raise this argument on her behalf, taking both a practical and member-friendly approach. The determination helpfully runs through the elements for an estoppel defence to succeed.

The determination: Ms E (CAS-50008-T7M8)

Mr D – no right to offset contributions where a connection was insufficiently proven

Mr D complained that Teachers' Pensions (TP), having disallowed part of the pensionable service for a former teacher at Tower House School, returned employee contributions to her but refused to refund employer contributions to him either personally or in his capacity as the former sole director and shareholder of the school business.

Facts

From 1982 until 2012, Mr D was the sole proprietor of Tower House School. Tower House School Torbay Ltd (THST) was incorporated in 2012 to operate the school, with Mr D the sole shareholder and director. Mr D held the school building separately, and from May to December 2017, Element Schools (ES) leased the building from him. Mr D said that there was no transfer of ownership of THST to ES, and no element of goodwill.

Miss R was a member of the Teachers' Pension Scheme (the Scheme), administered by TP. She retired in November 2016. In February 2017, TP wrote to Mr D to say that part of Miss R's salary was not pensionable under the Teachers' Pensions Regulations 2014 (the Regulations), and that both Miss R and the school would be entitled to a refund of the excess contributions paid. The excess employer contributions totalled over £28,000. However, TP refused to refund the excess employer contribution to Mr D unless he could provide evidence to show that the employer's contributions were paid from his personal bank account.

Decision

TPO upheld Mr D's complaint, finding that TP had incorrectly offset overpaid contributions due to THST against a debt owed to it by ES in respect of different employees.

It was generally agreed that, following its incorporation in 2012, THST became Miss R's employer and was responsible

for the payment of contributions. Mr D had however subsidised THST's contributions generally from 2015 onwards. TP had not established, on the balance of probabilities, that there had been a sale or transfer of the school to ES. Although Mr D had used 'imprecise language at times' to describe how the school came to be operated by ES, he had co-operated fully with the investigation and it was not likely that he had deliberately withheld information. But either way, Miss R retired before any such transaction took place. There was therefore no continuity of her employment between THST and ES, even if the business of the school had been transferred to ES. Further, there was no contractual or other relationship between Miss R and ES giving ES a right to receive a refund of employer contributions.

TP argued that a degree of continuity between the business operated by THST and ES allowed it to 'offset' the contributions owed to the Scheme by ES and those owed back to the school in respect of Miss R, as a self-help remedy. However, TPO noted that the school as a business had no legal personality and could not have been responsible for making or receiving refunded contributions. The refunded contributions were due to Miss R's employer. Although unpaid contributions in respect of other staff after June 2017 were due from ES, this was an entirely different entity. Accordingly, TP could not properly set-off payments in the manner it was attempting to: the two sums were insufficiently connected. Neither Mr D nor THST were liable to pay ES's unpaid contributions. There was also no statutory right of set-off in the Regulations which would allow TP to set-off in this way.

TPO ordered TP to pay THST the sum of the excess employer contributions, plus interest.

Impact

At the time Mr D brought his complaint, THST had been dissolved and the complaint was brought solely by Mr D in his personal capacity. During the investigation however, Mr D successfully applied to court to restore THST to the register, and TPO consented to his request to amend the complaint to include THST as an applicant – another example of TPO acting a pragmatic, and one assumes cost and time saving, manner.

This is an unusual case, particular to its facts – which include a complex and unclear employer history. The determination might be of interest in situations where a transaction does not result in the new body taking over responsibility for pension contributions (NB while it gets a brief mention, there was no question of TUPE issues in this case)

The determination: Mr D (CAS-32978-T3X8)

Ombudsman news:

The importance of clear wording

A recent note from TPO titled 'How to avoid the Ombudsman: Providing clear and detailed retirement statements' references the **determination of a complaint** from a member who was disappointed in the way her benefits were commuted to provide a pension commencement lump sum (PCLS). The member felt that she had suffered a financial loss because the element of her pension that was subject to guaranteed increases in payment was commuted first to provide the PCLS.

Although TPO found no maladministration or breach of law in this case, the Ombudsman notes that it highlights 'the importance of providing clear and detailed information to members about their benefits to avoid the risk of future complaints'. It recommends that trustees and administrators consider reviewing the wording of their retirement statements, including to make sure they clearly set out any impact of a member opting to take the PCLS has on future increases to their pension.

While this referenced retirement statements specifically, clear and detailed wording of course should be applied to all communications - see our case studies on **pages 2 and 3**.

TPO latest report and accounts and Corporate Plan

TPO published its **annual report and accounts for 2022/23**. Demand for TPO's services continues to rise, with the number of complaints received increasing by 17% from the previous year. The three most common topics of closed pensions complaints were contributions, administration and transfers.

TPO also closed 49% more cases, partially thanks to additional funding from the DWP that provided additional resource. However, waiting times continue to be a 'significant issue', and TPO notes that addressing this is a priority.

TPO's **Corporate Plan 2023-26** sets out its strategic goals for the next three years. These include tackling the 'unacceptable waiting times' and identifying further working efficiencies. It remains whether the 2023 **cyber incident** it suffered has impacted waiting times further.

TPO also hopes to 'improve dispute resolution in the pensions industry', working collaboratively with key stakeholders. Its aim is that 'clearer signposting and increased awareness of TPO's approach to resolving disputes will improve the customer journey by ensuring resolution at the earliest possible stage in the complaints process, preferably without the need for TPO to be involved'.

Recent & forthcoming from TLT's Pensions team:

- See our '**Pensions – key issues for your trustee agendas – January 2024**' briefing for current hot topics and expected developments, with further detail on the governance implications of the **General Code**, 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 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.

Pensions, Chambers

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