

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@allenovery.com.

Transfer delays: investment loss

There is new guidance from the High Court on determining if a member has suffered investment losses due to a delayed transfer: *Tenconi v James Hay*. The member had complained about losing the opportunity to invest at the time of the Brexit referendum – investing to take advantage of market changes remains a topical issue in light of the UK's potential departure from the EU.

The Pensions Ombudsman (TPO) had concluded that the losses claimed were both too uncertain and not reasonably foreseeable.

The High Court ruled that TPO had applied the wrong test, and had set too high a bar. The matter was remitted to TPO to be decided, with the following guidance:

1. Identify the date on which the funds should have arrived, if there had been no maladministration.
2. Determine what the member would have done if the funds had arrived by that date (the member bears the burden of establishing this).

If TPO accepts that the member intended to invest to take advantage of market changes related to the vote, the member would not need to show precisely which shares would have been bought. Instead, TPO would need to consider the nature of the portfolio likely to have been bought (and could have regard to the member's pattern of investing), including assessing whether the submissions are based on hindsight.

What does this mean for trustees?

Trustees and administrators should take note of the judge's view on how to assess investment loss when addressing similar complaints. It remains to be seen whether there will be a different outcome in this case; this will be for TPO to determine following further submissions by the parties.

Buy-in/buyouts and transfer values

Last quarter we reported on a determination by the Deputy Pensions Ombudsman that a member had suffered distress and inconvenience where he had not been informed of the impact of a buyout on his transfer value – the administrator offered GBP1,000 compensation, which was considered appropriate, although it was not found to be at fault for reducing the transfer value.

TPO has now decided two further complaints dealing with similar issues ([PO-28609](#) and [PO-24370](#)). In both cases, the transfer value basis had changed following the purchase of a bulk annuity policy. In PO-28609, the member had received a quotation guaranteed until June 2018 and the transfer basis changed that month. In both cases, the guarantee period expired before the changes.

In both cases, TPO did not uphold the complaints. He commented that the trustees were not obliged to:

- notify members of the intention to take out the policy;
- notify members that the transfer value basis was being reviewed or that transfer values might reduce;
- honour a transfer value after the guarantee period.

What does this mean for trustees?

In the earlier decision, the member's transfer quotation was nullified by the transaction, although in the end the member did not submit the required paperwork by the end of the guarantee period. In these two decisions, the guarantee periods had already expired before the adoption of the new factors. In the latter decisions, TPO was not supportive of the argument that trustees are required to provide prior notification or warning to members, or to honour an expired CETV. Trustees anticipating a review of transfer value factors should ensure that they seek advice on these issues.

Late notice of default fund switch

In [PO-27980](#), a deferred member complained that he was not given enough time to consider his options after being informed about a change to the default fund, meaning he had suffered an investment loss. He had received an email in the evening stating that his funds would be automatically moved to the new default fund unless he informed the trustee of an alternative fund choice by midnight that same day. The trustee had intended to inform all members of the change earlier, but had only contacted active members.

The complaint was not upheld – the trustee had acted in accordance with the rules, which allowed it to change the fund and did not require it to notify members. There was insufficient evidence that the member would have acted differently if he had been given information earlier, and no evidence that he was worse off. The trustee had offered GBP500 compensation for distress and inconvenience, which was considered appropriate.

What does this mean for trustees?

Investment changes are a topical issue, particularly in light of the heightened focus on environmental, social and governance issues.

This decision is a reminder to plan changes to funds carefully, to reduce the risk of complaints and potential compensation. Scheme rules commonly give trustees power to withdraw a fund or switch funds without member notification or consent, in case a change needs to be made urgently, but trustees should consider whether prior communication would be appropriate.

Watch this space

- Changes to TPO's processes are possible following a consultation on the Early Resolution Service and other matters (depending on the approach of the next government).
- Clarification is expected on the impact of the *McCloud/Sargeant* litigation on public sector pensions. In these cases, transitional protections on scheme closure were held to be unlawfully discriminatory.

Equalisation: *Safeway v Newton*

- Following the *Barber* decision in 1990, pension benefits for men had to be levelled up to those enjoyed by women, in the period from the judgment until the scheme rules were amended to achieve equalisation (this period is known as the '*Barber* window'). 'Levelling down' is the practice of lowering the retirement age for men to that of women during the *Barber* window, but then equalising at a higher age for both.
- The Court of Justice of the European Union has now ruled in *Safeway v Newton* that retirement ages can only be retrospectively 'levelled down' (under a power in the scheme rules) where this is objectively justified. The case will now return to the Court of Appeal.
- Schemes that initially equalised retirement ages on an informal basis (eg using an announcement) may wish to consider taking advice. [Read more](#)

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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 'brilliant', 'unflappable, easy-going and very hard-working' and has 'really good market insight and technical knowledge'.

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