

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 cases that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

Suspension of fund switches can be reasonable, but communication is key

The Pensions Ombudsman (TPO) recently held that suspending member fund switches due to market conditions was reasonable, although updates should have been provided to members: **read the decision**.

In a scenario which will have been familiar to many trustees in the last couple of years, Mr N's pension was invested in a property fund which was gated (meaning withdrawals were restricted) due to an increased number of disinvestment requests following Brexit. The restriction was communicated to members in 2016 and initially stated to be in place for 12 months. This was extended (without proper explanation to members) and the restriction was lifted in Q3 2019. Mr N requested a switch out of the fund on a number of occasions while the restriction was in place. He complained about delays and lack of updates, and claimed investment loss.

TPO found that neither the trustee nor the administrator was responsible for any financial loss, as they had no say in the introduction of the fund restriction or how long it was in place: this was the decision of the fund provider Aviva. Aviva was also not liable for any loss as it had acted reasonably in imposing the restriction in order to protect the interests of all those invested in the fund (and this was common practice among property funds at the time). TPO did agree that the administrator should

have provided regular updates, which it had promised. He found that the £200 compensation already offered by the administrator for the distress and inconvenience caused by this was reasonable.

What does this ruling mean for trustees?

This is helpful for trustees: where investment funds impose gating or other dealing restrictions they can be reassured that TPO will not find them responsible for the actions of the funds (and in any case, TPO found those actions to be reasonable to protect the fund's investors). It makes it clear, though, that pro-active communication is important, including updating members when the position changes and providing updates when these are promised.

Mind the employer/administrator/trustee gap

TPO has recently ordered an employer and administrator to pay compensation for a 45% tax charge incurred because of their delays in dealing with a death in service case: **read the decision**.

TPO found that the tax charge had arisen largely because of delays in investigating the case (including 15 months in which no action was taken), meaning the payment was made after the two-year tax deadline. However, he held that the beneficiaries should share responsibility for not pursuing matters during the delay, so the employer and administrator were ordered to each pay one

third of the tax charge, meaning the beneficiaries bore the remaining third.

Part of the delay had been caused by the employer continuing to pursue an unresponsive beneficiary for information. TPO noted that, while this may have been in line with the standard process, where this wasn't working it was incumbent on the employer to seek the information from someone else, rather than just give up. Neither the employer nor the administrator was pro-active in progressing the case, and there were failures in communication between them. In addition, the trustee was never made aware of the death.

What does this ruling mean for trustees?

This is a reminder of the need for clear processes and lines of communication for sharing information between employers, administrators and trustees, to avoid cases falling through the cracks. Trustee reporting is key, to ensure trustees are aware of issues as they arise and can monitor how cases are progressing.

It also highlights that schemes shouldn't blindly follow standard processes: where they aren't working, TPO expects different ways to be sought to resolve issues.

Take care when treating members differently

The Employment Tribunal has recently considered a case where a scheme stopped providing annual benefit statements to employees on a disability income scheme (DIS): **read the judgment**. This appears to have been because the bespoke nature of those employees' benefits made the statements more expensive to produce and would have delayed those of other employees. There was no legal obligation to provide the statements and employees on the DIS could request the information separately.

The Tribunal found that the employer's failure to provide the statements was a breach of the duty to

make reasonable adjustments and put the claimant employee at a substantial disadvantage (because he could not challenge the accuracy of his pension benefits). The employer could reasonably be expected to have known that the employee in question would have been placed at a substantial disadvantage, especially because it did not seem that the decision had been communicated to him. Although it would have caused some inconvenience and modest cost to issue the statements, it was not impracticable and certainly was not an insurmountable obstacle.

What does this ruling mean for trustees?

Although the employer was the subject of this claim, similar reasoning could be used in a claim against trustees. This case is a reminder to consider carefully before treating categories of member differently, even where there may be practical incentives for doing so. The judgment suggests that equal treatment must be impracticable or provide an insurmountable obstacle, in order to be justified.

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Jason is a Counsel in the Pensions 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 quotes clients as saying that Jason '*anticipates issues and handles detail well*'.

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