

**Scheme administration, trustee decision making,
remedies and defences
– what has the Pensions Ombudsman been up to
this year?**

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CMS



Scheme administration – transfers – one month rule – Mr R (PO-24554) 11 March 2021

Facts

- Pension provider (Aegon) allowed member to transfer to alleged liberation scheme on 15 February 2013 (first attempt) and then 19 March 2013 (successful transfer)
- TPR's scorpion guidance was issued on 14 February 2013
- Member complained in 2018 that the transfer should not have been made and Aegon was negligent in allowing the transfer

Held:

- TPO not bound by previous decisions on transfers where he has stated that trustees and providers should be given **three months** from February 2013 to implement changes from TPR guidance
- Having reviewed the previous determinations and the evolving regulatory position, he said that *“a period of **approximately one month** would generally be sufficient for a provider to put in place any procedures necessary as a result of the Regulator's new guidance”*
- The complaint was **not upheld**

Comment:

- Suggests that TPO expects trustees/providers to update their procedures more swiftly following new guidance
- PSIG guidance updated in April 2021 (refers to Mr Z – PO 27901 (26 June 2020) which states that three months is a reasonable timeframe!)
- If one month timeframe cannot be met then trustees/providers should consider suspending transfers while procedures are updated

Scheme administration – claims management companies - what can schemes do?

CMCs

- Claims management companies involved in an increasing number of TPO complaints
- The CMC takes ownership of a member's complaint for them and normally charges a fee
- Starts with a Data Subject Access Request - previous transfers, ill health retirements etc
- Then the CMC leads the complaint
- Can cause a lot of extra work for trustees/providers – many initial complaints have no basis
- TPO is aware of the increasing amount of CMCs involved in complaints

What can Trustees/providers do?

- TPO asking trustees and providers to remind members about TPO service
- If scheme is approached, ensure member is aware that the CMC is starting a complaint and request letters of authority
- Check whether member is aware of any fees involved
- Be aware when DSAR comes in

Decision making – transfers – are trustees being too cautious? – Mr Y (PO-24361) 17 February 2021

Facts:

- Member lived in Jersey and wanted to transfer to a personal pension scheme based in Jersey
- Trustees declined to permit transfer because they did not think the receiving scheme satisfied the QROPS requirements
- Member had to transfer to another UK based scheme and then transfer to the Jersey scheme
- He later complained stating that other providers had agreed to transfer without any issues

Held:

- TPO held that the Trustees took irrelevant factors into account and did not properly explain their reasoning
- Agreed that HMRC's approach might add uncertainty, but it was not a reason to refuse a statutory transfer
- Trustees should not have suggested that any further due diligence should be done at the member's expense
- Trustees had to pay member £1000 for serious distress and had to reconsider whether or not the receiving scheme was a QROPS
- If they concluded it was a QROPS, they must establish the member's losses and make up the difference

What can Trustees/providers do?

- Trustees should ensure that they do the appropriate due diligence for transfer requests
- Cannot refuse a transfer because it is too taxing to decide whether the statutory criteria are met.

Remedies –liability for breaches of trust – Ms T and others (PO 15521 and others) 2 July 2021

Facts:

- The scheme, a SSAS, established to solely invest in one company, Realsave created by Mr Stone, an IFA
- New members were offered 20% of their transfer value in cash
- 30% of the transfer value was paid to Trustee’s brother as introducer’s commission
- Mr Stone went to jail for 6 years for fraud for a separate investment and scheme funds were used for Mr Stone’s confiscation order
- Three members complained that the Trustee (Mr Kench) invested the scheme funds inappropriately and this resulted in their benefits being lost.

Held:

- Oral hearing held due to potential for personal liability - Trustee claimed that he was not aware of trustee duties or TPR
- TPO held that the Trustee had acted in breach of trust including breaching fiduciary duties to manage conflicts of interest and not to profit from the role, failing to operate appropriate internal controls, failing to comply with TKU requirements and providing false information to members
- Could not rely on section 61 TA 1925 because he had not acted honestly or reasonably and he had no defence of members having consented or been contributorily negligent
- Trustee had to restore all funds paid to members (around £615k transferred to scheme) with interest of 8% and £6000 to each member for non-financial injustice
- TPO also informed TPR to consider whether it should appoint an independent trustee

What is next for extreme breaches of trust?

- TPO informing TPR about “shocking” cases of breach of trustee duties
- TPR currently pursuing a criminal investigation for ERI after TPO determination on Norton Motorcycles

Remedies – lost investment opportunity – Mr T (CAS 38354) 12 August 2020

Facts:

- Member wanted to transfer his pension to a SIPP by 23 June 2016 to take advantage of market changes following Brexit
- Funds were not transferred until August 2016
- Member initially complained to TPO in 2018 and TPO did not uphold his complaint
- Member appealed to High Court and the case remitted to TPO.

Held:

- TPO satisfied in second determination that member would have invested his entire fund of £250,000 in the FTSE 100 immediately after the vote
- Held that Mr T lost the opportunity to make a profit of £43,700 and the provider should compensate him.

What can Trustees/providers do?

- Be aware of potential liability where maladministration prevents a member from achieving financial profit
- Concerns about prospect of liability in transfer delay cases
- Facts here unusually specific – member had a clear investment plan in mind dependent on specific timescales being achieved

Other interesting determinations

TPO bound by same limitation period as the courts in disputes of law

Mr R (PO-12808) 13 November 2020

TPO's approach to pursuit of section 75 debts – even where Trustees have a right to recover, the process should be reasonable

Mr E (PO-27028) 9 November 2020

Trustees do not have to consider complaints where decision solely lies with employer

Mrs L (PO-39557) 23 April 2021

Disclosure Regulations do not require trustees to disclose trustee minutes

Mr N (PO 29382) 8 January 2021

What's next for TPO?

- Continuing to improve customer journey
- Focus on complex complaints involving dishonesty
- Possible trends for future complaints
 - Automatic enrolment
 - Interaction of pension freedoms with the pandemic
 - Pensions Dashboard
 - New pension transfer requirements under PSA 2021



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