



# UK Pensions: Line of duty

Where should it be for employers and trustees providing benefit information to terminally ill members?

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## Briefing

May 2019

## Introduction

The Pensions Ombudsman (TPO) has often considered the duties of trustees and employers in the context of the obligations to provide pension benefit information to members. For a scheme to run smoothly, there must be a flow of information between the scheme as provider and the member (or survivor) as recipient.

Often, these duties will be governed by specific legislation. However, where pensions law is silent, the area can be tricky for employers and trustees to navigate, and considerable uncertainty may arise.

This briefing examines the level of information trustees and employers should provide to a member when they become aware of a diagnosis of terminal ill health. What are the obligations to inform a member of any scheme benefit choices and when might this information stray into the territory of unauthorised financial advice?

## Disclosure obligations on trustees

By law, a trustee must make certain scheme documentation available to members, including the trust deed and rules. The statutory disclosure requirements apply under section 41 of the Pensions Act 1995 and the Occupational and Personal Pension Scheme (Disclosure of Information) Regulations 2013, as amended (Disclosure Regulations). The Pensions Regulator has also issued [guidance](#) for trustees on member communications.

## Disclosure obligations on employers

The Disclosure Regulations impose information provision duties on employers too, but a strand of litigation has suggested that there may be additional contractual obligations to advise members of their pension scheme rights.

In *Scally*<sup>1</sup>, the House of Lords came close to finding a duty on employers to advise in respect of scheme benefits. *Scally* involved a collective agreement giving doctors a time-limited entitlement to buy enhanced pensions rights. When this opportunity was missed, some doctors claimed that they had been unaware it existed. The House of Lords implied a term in their employment contracts that the employer would take reasonable steps to inform members of their rights. However, in subsequent cases, *Scally* has been narrowly interpreted.

In *Eyett*<sup>2</sup>, an employer failed to advise a scheme member that if he retired a month later than planned, his pension would include his pay rise and thus be higher. The High Court reversed TPO's initial decision and found the member had all the information necessary to reach this conclusion himself. He had not asked the employer for advice about the chosen retirement date, and there was no employer duty of good faith to warn him that it was financially detrimental. More recently, a line has been drawn by the Court of Appeal, holding that there is no employer duty to take reasonable care of an employee's financial well-being: *Crossley*<sup>3</sup>.

Thus, employers are not obliged to advise members about their pension rights. Neither have they a duty to highlight potentially detrimental member decisions about taking benefits. Indeed, employers must avoid giving anything that might constitute financial advice as they are not normally authorised to do so under the relevant Financial Conduct Authority (FCA) rules.

However, these judgments have been supplemented by numerous decisions from TPO finding maladministration where employers have failed to follow good practice. Determinations from TPO are not binding and only affect the parties to whom they relate but there have been some apparently conflicting decisions where a member suffers from terminal ill health. Below, we examine two cases on the issue of benefit information provided by the scheme, and three where the member's retirement date affected the level of benefits.

### **Estate of Mr R<sup>4</sup> : trustees failed to inform terminally ill member that retirement options were available only during his lifetime**

In this case, TPO upheld a complaint where the scheme's trustees failed to inform a terminally ill deferred member that certain options were available only if exercised prior to his death. The trustees had a fiduciary duty to provide Mr R with all the relevant information to enable him to make a fully informed decision but this duty had been breached. Despite being aware that the member had a terminal illness, the trustees had not mentioned that the benefits were dependent on the member making a lifetime choice, and that failing to do so would reduce his wife's future benefits. If there had been greater clarity and urgency TPO found, it was more likely than not that the member would have acted to his eventual widow's financial advantage. Where benefit options were subject to conditions, the trustees should ensure the member was aware of them.

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<sup>1</sup> *Scally v Southern Health and Social Services Board* [1992]

<sup>2</sup> *University of Nottingham v Eyett* [1999]

<sup>3</sup> *Crossley v Faithful and Gould Holdings Limited* [2004]

<sup>4</sup> Estate of Mr R (PO-17639, August 2018)

TPO directed the trustees to calculate the amount of lump sum the member's estate would have received had he applied for the more advantageous option in his lifetime and to pay this to the estate directly. They were also directed to uplift the spouse's pension on the same basis, as well as paying Mrs R £500 for distress and inconvenience.

### **Mrs L<sup>5</sup> : no employer duty to inform terminally ill member of death in deferment benefits**

TPO heard two complaints brought by Mrs L against her husband's scheme. Mr L had a terminal cancer diagnosis in April 2014 and died in October 2015. The first complaint, concerning alleged misleading guarantee wording, was dismissed.

The second complaint was brought on behalf of Mr L's estate that

- Delays in providing information to Mr L about his deferred member options amounted to maladministration.
- Mr L had not been informed about how his death benefits might be affected by his decision to defer his pension.

Mrs L claimed that the trustee and employer were under an enhanced duty of care, as they were aware Mr L had a terminal illness.

TPO agreed that there had been maladministration, as the trustee had taken almost six months to issue a benefit statement and had not met its own service standards in providing a transfer value. TPO did not agree that insufficient information on benefit options had been provided. Considering *Scally*, TPO found that this duty applied only where an employee could not reasonably be expected to be aware of the term unless it was drawn to his attention. The employer and trustee had no duty to provide information on which option was most financially advantageous to Mr L. Neither was there evidence that he had asked specifically about death benefits or provided other details leading to any enhanced duty.

Although TPO considered that the maladministration was serious and awarded £1,000, the trustee had already offered Mrs L £1,600, meaning no additional sum was payable.

### **Estate of Mr Y<sup>6</sup> : employer should have maximised benefits by bringing forward retirement date**

The Deputy Pensions Ombudsman (DPO) upheld a complaint where an employer failed to bring forward a member's retirement date. The member suffered from serious ill health and was given a 12-week notice period before retirement. He was informed that his wife would receive significantly more in pension benefits if he died in retirement, rather than in service. The couple was told to contact the employer again if the member's condition worsened so that his notice period could be brought forward.

The DPO heard that the complaint hinged on a telephone call from the spouse to the employer once she learned that her husband's condition was terminal. Mrs Y claimed that she informed the employer on the day of the terminal diagnosis and made a request to

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<sup>5</sup> Mrs L (PO-18412, November 2018)

<sup>6</sup> Estate of Mr Y (PO-13540, July 2018)

withdraw benefits, which the employer refused. The employer denied this and said that the spouse had simply asked to withdraw part of her husband's pension for a holiday prior to him undergoing further treatment.

The DPO preferred Mrs Y's account of events on the balance of probabilities. The call was made on the same day as the terminal diagnosis and the DPO held that this information was sufficient for the employer to suggest retirement was brought forward, even without a specific request. The employer was directed to calculate and pay the difference between the death benefits paid and those that would have applied had Mr Y's service been terminated within two days of the disputed phone call.

### **Mrs T<sup>7</sup>: no implied duty on employer and financial adviser to advise dying employee on implications of taking ill health benefits early**

In a conflicting decision, TPO dismissed a complaint that the scheme's employer and its financial advisers failed to advise a dying member of the implications of taking his ill health pension benefits early.

TPO held there was a difference between an employer giving prohibited financial advice to employees and providing information to assist them. All the relevant information was provided in the scheme booklet including how the benefit level depends on the employee's membership status in the scheme at the time of death, as well as when to seek independent financial advice. The employer's financial advisers were required to give advice to employees following a member's request, which had not been made.

TPO considered both *Eyett* and *Scally*, but found that *Scally* was decided on its facts, and Mr T had the necessary information available in the scheme booklet.

### **Estate of Mrs N<sup>8</sup>: employer should have set terminally ill member's retirement and approval of benefit to same date**

The DPO upheld the complaint of Mr N, the widower of a member who died one day before her retirement date. The member's ill-health early retirement had been approved, and her retirement date was set for later in the month. She died in service and as a consequence her widower's benefits were reduced. The DPO held the employer had jeopardised the member's benefits unnecessarily by not setting the retirement and approval dates for the same day, for which there was no justification. Retrospective amendment was not possible under the scheme rules. The DPO directed the employer to pay any difference to the widower, plus interest and any tax liability incurred.

## **Comment**

There are clear administrative difficulties where employers and trustees learn of a member's terminal ill health, and where decisions (and the timing of decisions) can have a significant impact on the resultant level of benefits.

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<sup>7</sup> Mrs T – (PO-19080, February 2019)

<sup>8</sup> Mrs N – (PO-19673, March 2019)

TPO's determinations, while often sympathetic to the member, must follow both statute and case law where members have sought advice which employers cannot give. Although it would often benefit a member if the employer takes an extra step to provide assistance, that may involve taking on a responsibility that no prudent employer would choose to adopt. Trustees may also face questions from employees that could benefit from that extra step, and it is important to ensure that any responses do not cross the line from providing information to giving unauthorised advice. In broad terms, employers are not obliged to advise members about options relating to their pension rights, highlight potentially detrimental member decisions or inform members of how best to exercise their choices under a scheme's rules. The only requirement is to make sufficient information available to the member, and there is no automatically enhanced duty when a member is terminally ill.

The case of the *Estate of Mr Y* covers a sad sequence of events. It seems that the member was not fully familiar with the technical details of the pension options in his final months and this no doubt contributed to the confusion surrounding the disputed phone call. From an employer perspective, this determination may cause concern, as it suggests a widening of the duty to advise employees. Nevertheless, the Courts have decided that the scope of the duty on employers to advise on pension rights is fairly narrow. TPO is generally reluctant to rule that the *Scally* duty has been breached. Following *Crossley*, it is clear that there is no implied duty on an employer to take reasonable care of an employee's financial well-being.

In the case of the *Estate of Mr R*, the trustees were found to have breached their fiduciary duty by failing to provide the member with all relevant information to ensure he made an informed decision, and significant compensation was awarded to his estate as a result. However, that finding was not mirrored in *Mrs L's* complaint, where TPO found that the trustee and the employer had provided sufficient information to enable the member's own sound decisions. The only breach here was the severe delay in process, which amounted to serious maladministration.

Employers should be aware that TPO has often found maladministration where employers have failed to follow good practice. Trustees and employers should be on high alert when they learn of a member's terminal illness and ensure related benefits queries are dealt with quickly.

It is simple human kindness to exercise some understanding that members' thoughts will not be fully focused on the finer details of their pension benefits when they have received a terminal diagnosis. It must be best practice for trustees and employers to reiterate in simple terms the scheme rules that apply and, where possible, set an ill health retirement date as early as possible. Where there is a discretionary notice period, employers may wish to consider waiving it altogether. Employers should always seek to provide members with full details of a scheme's benefit structure, ensure the information is clear and ultimately suggest that members seek independent advice before making important financial decisions.

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