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CMS Pensions Disputes Update

Spring 2026

Introduction

Welcome to the Spring 2026 edition of the CMS Pensions Disputes Update.

It continues to be an interesting time in the Pensions litigation world, with some key decisions being made and others anticipated – including the decision of the Court in the *Verity Trustees* case. We are also seeing a material shift in the way the Pensions Ombudsman looks at certain types of disputes.

In this publication, we recap some of the key developments in pensions disputes in the previous six months and comment on the themes and takeaways for trustees, companies, advisers and providers.

If you have any questions about anything in this update, please do not hesitate to reach out to your usual CMS Pensions contact, or any of our CMS Pensions litigation specialists.

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Brambles Administration v Harvey

Liberation scheme trustees fail in challenge to TPO determination

14 November 2025

This was an appeal from a Determination in which the former Deputy Pensions Ombudsman found that individual trustees of three liberation schemes had committed numerous breaches of trust in relation to investment duties, scheme governance and conflicts, ordering them to restore over £5m to the schemes.

The High Court rejected the appeal on all grounds. In particular, the judge held that complaints were not time-barred (because time did not necessarily run from when members first became suspicious, but when they realised they had been scammed). There had also been ample grounds to support the Deputy Ombudsman's conclusion that the trustees' conduct was dishonest, and he had therefore correctly rejected any argument that members could have consented to it, or been contributorily negligent.

Case comment

A resounding win for the Ombudsman's office. This was a case which had been driven by the Ombudsman's Pensions Dishonesty Unit (PDU), a specialist pilot unit within the Ombudsman's office that was established to investigate serious breaches of trust and misappropriation of funds by trustees.

The PDU pilot ended on 31 March 2025 due to funding constraints, but the Ombudsman's office has signalled that they may in future take forward the types of cases that the PDU specialised in where there is no prospect of alternative redress.

3i PLC v Decesare

A "accrued rights or interests" fetter did not prevent future service changes

21 November 2025

The scheme amendment power provided that no modification could be made to "diminish… the accrued rights or interests of any Member or other person in respect of benefits already provided under the Plan".

The scheme had closed to accrual in 2011 and was now in wind-up, with the trustees having consulted with members about distributing scheme surplus to the employer. However, following the Court of Appeal decision in BBC v BBC Pension Trust concerning the meaning of "interests", the trustees sought the Court's confirmation as to whether the amendment power fetter permitted amendments to terminate or reduce the rate of future accrual of benefits.

The Court agreed that it did. The word "accrued" applied to each of the words "rights or interests" – i.e. the fetter relates to accrued rights and accrued interests, and there was nothing to suggest that the relevant 'interests' were concerned with future service accrual. The start and end point of the analysis was the natural meaning of the fetter, seen in context, which was preventing amendments to the scheme which would diminish past service benefits.

Case comment

This is unlikely to be the last case on interpreting amendment power fetters, especially as schemes continue to undertake due diligence in the context of buy-outs with insurers and consider their end-game solutions.

However, it does provide a useful steer for schemes which contain similar wording.

CAS-13126 Mrs R (HSBC Bank Pension Scheme)

Evidence and burden of proof in lost records cases

3 December 2025

Mrs R was employed by the bank between 1972 and 1990. On reaching her normal retirement age in August 2016, she wrote to the scheme trustees asking for her pension to be put into payment, but the trustees said that they were no longer liable for her benefits as she had transferred out of the scheme in 1992.

The trustees had a guaranteed CETV illustration for the member from January 1991 and a ledger entry from September 1992 stating that her benefits had been transferred to a personal pension plan.

HMRC records suggested that Mrs R accrued benefits in the scheme between 1978 and 1984 which had transferred to the personal pension provider; but that benefits for a final period of membership between 1986 and 1990 had remained in the original scheme.

The member said she had no memory of requesting any transfer to the provider and the provider's successors in business said they had no record of her.

The Deputy Pensions Ombudsman emphasised that the starting point was that "the liability remains with the original pension scheme, unless it can be shown, on the balance of probabilities, that the deferred pension benefits were successfully transferred to another arrangement." It was inherently unlikely that Mrs R would have initiated a substantial financial transaction and have no memory of it, and the complete absence of documentary evidence in relation to the alleged receiving plan suggested that Mrs R's deferred benefits were never transferred. The HMRC records could not be solely relied upon in this case because they were either incomplete, inconsistent or incorrect.

The trustees had provided no evidence of payment such as a cheque, receipt or bank record. The DPO concluded that the most plausible explanation was that the transfer was never successfully completed and that an administrative error occurred in updating the ledger entry and in updating HMRC; the DPO therefore found that the trustees remained liable to provide Mrs R pension benefits in the scheme.,

The DPO also made a distress award to Mrs R of £1,000. The matter stemmed essentially from the trustees' failure to maintain complete and adequate records to prove either Mrs R's entitlements or that a valid transfer had taken place. "*The Trustee has acted as if it were for Mrs R… to disprove that a transfer took place, rather than for the Trustee to prove that it had made a transfer payment and had been discharged of all liability to provide Mrs R with a pension*".

Case comment

This case shows that the burden of proof is on trustees to show that transfers are made.

This Determination followed a number of others on recovering overpayments made under this scheme, including the 'lead case' of Mr E in April 2024. In that Determination, the Ombudsman held that as recoupment was an equitable remedy he had to consider whether it was fair in all the circumstances for the trustees to recoup the overpaid sums, and that to assess what was equitable for these purposes he would consider 'by analogy' the availability of a change of position or estoppel defence, despite those being legal defences rather than defences to an equitable claim.

In both Mr E, and the subsequent Determination of Mr & Mrs D, the Ombudsman held that virtually all the overpayments made were irrecoverable. However, in Mr M's case the Deputy Ombudsman came to a different conclusion on the facts, finding that it was equitable in all the circumstances for the trustees to recoup the £12,600 overpayment in full.

The main difference from previous cases was that Mr M had not demonstrated legal "detriment": he had not spent the money irreversibly, in circumstances where he would not have done so 'but for' the overpayment. Mr M continued to work between his pension coming into payment in 1999 and his retirement in 2019 and had sufficient means from other sources to maintain his standard of living.

Case comment

The Ombudsman's position is that trustees must satisfy themselves it is 'equitable' for them to exercise their right in principle to recoup past overpayments from future instalments of pension. This Determination is a useful reminder of the circumstances in which they may be able to do so.

CAS-52655 Mr M (BIC UK Pension Scheme)

Trustees could equitably recoup overpayments going back 22 years

12 December 2025

Places for People Trustee v Places for People Group

Court agrees to settlement of Section 37 and other validity issues

19 December 2025

Between 1993 and 2011, a number of deeds making purported benefit changes were executed in relation to the scheme, including to reduce the rate of future accrual and to close the scheme to accrual. However, issues had arisen as to whether deeds were properly executed as a deed; whether there had been a failure to obtain the required Section 37 confirmations following the Virgin Media decision; and whether some deeds were susceptible to rectification as they had not reflected the intention of the parties at the time.

The Court was asked to approve a provisional settlement reached between the parties which, very broadly, sought to ensure that:

- **all deeds at issue be agreed to be valid even in the absence of any Section 37 confirmation;**
- **deeds and documents be interpreted on the basis of the trustee's rectification claim;**
- **members would be granted additional benefits to reflect the possibility that the validity issues might mean members had a higher entitlement to benefits under the scheme than they have actually received;**
- **the parties execute validating deeds in relation to specific changes which might otherwise have been void under Section 37.**

The Court held that the settlement should be approved.

Case comment

The case is a good example of the breadth of the Court's power, in an appropriate case, to agree to settlement of claims.

4 Wheeler Ltd v The Pensions Regulator

Tribunal raps TPR over the knuckles for defects in AE enforcement procedure

2 February 2026

This was another unsuccessful employer appeal against TPR automatic enrolment penalty notices. However, the judge took the opportunity to register his concerns that TPR's "evident zeal" to enforce AE obligations must not override its obligation to act fairly, especially when dealing with unrepresented organisations with limited resources.

TPR had advanced legal arguments which woefully mis-stated the applicable law and should urgently review its standard pleadings to prevent "further indefensible arguments being advanced in future which might be seen as prejudicing the fair and proper administration of justice."

Case comment

This pair of cases demonstrate TPR's robust approach to enforcing compliance with automatic enrolment obligations.

The Pensions Regulator v Been London Design

TPR successfully appeals a Tribunal case on a point of error of law regarding the validity of electronic service

20 February 2026

In Been London Design, the First-Tier Tribunal revoked a TPR fixed penalty notice and vocally criticised TPR's auto-enrolment enforcement approach, including by communicating by post to the company's registered office instead of through email.

However, in this appeal (apparently the first of four such appeals brought by TPR), the Upper Tribunal held that the First-tier Tribunal had misunderstood the evidence before it. In particular, as s304(5) PA2004 only allows service by e-mail where a recipient has agreed to electronic communications, the judge below was wrong to find that TPR could have e-mailed the employer instead of sending correspondence to its registered address. The Upper Tribunal set the original decision aside and directed a rehearing.

Cyber-breach class action claim survives strike-out attempt

9 February 2026

This hearing concerned a group action launched against Capita in relation to the 2022/2023 cyber breach, brought on behalf of around 4,000 affected pension scheme members.

Capita argued that the claim should be struck out on abuse of process grounds, on the basis that the claimants' pleadings were inaccurate and used emotive language that inflated the alleged harm to members. However, the Master held that the high bar for strike-out on abuse grounds had not been met and that the claims should proceed to trial.

Case comment

Trustees of schemes that were affected by the cyber breach should monitor further developments in this case. Note that although the Master was aware of last year's ICO report on the breach, it was not necessary for him to consider it in this preliminary hearing.

McKavney v Serco Group

Court considers scheme rules references to retirement, redundancy & reorganisation

10 March 2026

In this appeal from an Ombudsman determination, in which the CMS team acted for the successful respondents, the High Court held that a member did not have a right to early payment of his deferred benefits under the scheme, either following an employment transfer in 2012 or his subsequent redundancy in 2015.

The judge found that when the member was subject to a TUPE transfer, he was not "*compulsorily retired from Service*", and that the phrase "*compulsorily retired from Service by his Employer due to redundancy or a reorganisation*" required involuntary termination of employment, not merely a change of employer through transfer which preserved continuity of employment. The drafter's use of the term "*reorganisation*" was limited to circumstances analogous to redundancy involving dismissal.

The judgment also considered the impact of the member having been a "protected person" under the Electricity Act 1989 regime.

Case comment

The facts of this case were specific (and complex), but it may be worth considering when construing scheme rules which refer to benefits becoming payable on redundancy or reorganisation, as well as of interest to schemes who have members who are "protected persons".

Mendes v Slater and Gordon

Court considers claim for lost TUPE-protected pension rights

19 March 2026

The member was TUPE-transferred to a new employer in 2012. By virtue of the ECJ ruling in the Beckmann case, his enhanced rights to pension on redundancy in relation to pre-transfer service should have transferred with him. However, in 2017 the member was made redundant and did not receive uplifted pension payments reflecting any 'Beckmann' rights: his new scheme paid him benefits calculated only on the basis of post-transfer service. In these proceedings, the County Court had to consider whether limitation prevented the member now claiming his lost TUPE rights.

The judge held that the member's claim for damages in both tort and contract arose from a one-off breach, which occurred at the date of redundancy when the employer failed to meet its contractual obligation to put the scheme in funds so that any enhanced redundancy benefit could be paid. The claim was therefore subject to a 6-year limitation period which ran from that date. The Court rejected arguments that the claim was one in respect of the loss of trust rights or for underpayment of benefits (which would not be subject to any limitation period).

Case comment

Occupational pension scheme benefit rights are generally carved out of TUPE protection, but this does not apply to certain enhanced rights to early payment. The case is worth noting as a rare example of the courts grappling with the issues that arise when rights under an occupational scheme do transfer.

Aabar Holdings v Glencore PLC

Court consider privilege within a "client group"

16 April 2026

The Commercial Court has held that internal communications between members of a corporate client group can attract legal advice privilege, provided they were created for the dominant purpose of seeking legal advice, regardless of whether a lawyer was directly involved in the communication.

The decision provides clarity for large organisations navigating disclosure obligations, however the ruling does not alter the narrow definition of the "client" for the purposes of claiming legal advice privilege, which was confirmed in SFO v ENRC following the well-known Court of Appeal judgment in *Three Rivers (No.5).*

Case comment

This welcome decision has potential practical implications for businesses, particularly large organisations with complex internal structures. For example, companies may not need to ensure a lawyer is copied into every internal communication relating to the process of seeking legal advice, in order to preserve privilege over that communication. When deciding whether a document is privileged, the key consideration is the main purpose of the document, not whether a lawyer was directly involved. Nevertheless, given that this is High Court authority, it is possible that this decision may be considered at appellate level.

The ruling does not, however, attempt to alter the fundamental principle of *Three Rivers (No.5)*, which the Court of Appeal followed in *SFO v ENRC* and *Jet2.com*, that communications between a company's lawyers and employees outside the designated client group do not attract legal advice privilege. An appeal to the Supreme Court would be required to change that position.

CAS-82907 Mrs T (NHS Pension Scheme)

Decision-maker with discretion must consider exercising it

21 April 2026

The member complained that the scheme manager refused to consider her request to re-assess the level of her ill-health early retirement benefits.

The member had asked for re-assessment outside the normal three-year limit specified for such an application in the scheme regulations. However, the regulations provided a general discretion to extend, "*in any particular case… any time limit mentioned in these Regulations*".

The scheme manager said that they had not considered the discretion in this case as the policy was only to do so where a member had made contact within the three-year period to advise of ongoing treatment, or treatment delays, that might take an application outside that period.

The Ombudsman said that while it was reasonable to have a general policy for the exercise of a discretion, it was wrong that in this case the exercise of the discretion was not considered at all. Even where a general policy existed, "*it is still incumbent on decision makers to consider that discretion in light of the facts of each case and/or an individual's specific circumstances*".

Here, alongside the member's individual circumstances there were special factors that could potentially be taken into account such as the impact of the COVID-19 pandemic on the member's ability to meet the application deadline.

Case comment

A reminder from the Ombudsman that trustees must retain some flexibility in exercising discretions, even where they have adopted a general policy, in order to avoid accusations of having "*fettered their discretion*".

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