Summary
• Disputes around pension provisions are often driven by a difference in motivation, but engaging all parties early on and listening to concerns can help prevent escalating conflict.
• Unions can offer valuable insight into member views and can also help to communicate complex pension changes with affected members.
• Pension investments are of increasing interest to trade unions, but pension scheme trustees must remain mindful of their fiduciary duties.

Unlikely allies?

Following a number of high-profile disputes, Sophie Smith explores how pension scheme trustees, sponsoring employers and unions can work together in the interest of members

Pensions as a topic does not often make national headlines, but when it does, it rarely seems to be portrayed in a positive light.

The Universities Superannuation Scheme (USS), for instance, has made headlines multiple times over the past year, shouldered with part of the blame for the disruption faced by thousands of students amid ongoing strike action.

At the heart of this dispute lies a shift away from the DB structure of years past. The USS is the latest in a string of schemes to reduce their DB offering, with just 11 per cent of DB schemes still open, according to the PPF's *Purple Book* data.

But that does not make the news any easier for members to swallow, and it may be that this 11 per cent proves much harder to shift.

"If you've got a DB scheme now, that means you've got a strong union," says TUC policy and campaigns support officer, Jack Jones, explaining that industries that did not have union recognition were the first to get rid of their DB schemes.

Jones suggests that a greater knowledge of what has been lost by those that have been moved away from DB is now prompting an increase in disputes, along with greater awareness of the shortcomings around the schemes that replaced DB structures, which Jones warns can be a case of "very significant downgrading".

Any financial cuts are also of increasing concern amid the current backdrop, as 20-20 Trustees trustee director, Stuart Walters, emphasises that "in today's fast-paced, pressurised and increasingly complex working environment, protection for workers facing harsh and uncertain workplace treatment and conditions has never been more important".

"With many businesses experiencing financial stress in the current climate, some are unfortunately facing the prospect of redundancies, changes in business ownership and amendments to employee terms and conditions," he says, stressing that "pensions is a very emotive subject".

Necessary evil or opportunistic cuts?

This emotion means that changes to pension provision can often be viewed through a very different lens by different parties. A Unite Union spokesperson, for instance, argues that some employers have made "opportunistic proposals" to change members pension provision when their covenant strength and levels of profitability haven't warranted it.

Unions are also quick to dispel the theory that they might not understand the pension landscape, as Unite argues that trade unions are "fully aware and understand key pension developments".

Despite the complexities, Unite says that employers and pension scheme trustees should "rightly expect challenge to their decisions" from unions; "especially when you consider that the First Actuarial Best-estimate Index shows the financial position of the UK's 5,318 DB pension funds on a long-term basis, allowing for realistic future investment returns, has a combined £350 billion surplus as at 31 March 2022".

Underlying motivation is perhaps the most dividing tension. Unite's spokesperson argues that whilst unions provide members with front-line support to defend and shape better pension outcomes, "most employers' focus is normally around increasing and protecting profits and their employees' cost-of-living struggle and future pension poverty is normally a by-product".

"Disagreements arise because both parties have different needs and stakeholders," adds former Society of Pension Professionals president, James Riley. "Pensions change is a significant issue for all parties and there will inevitably be disagreements given the different parties' responsibilities. Disputes have therefore always been a part of pension change and will remain so."

Whilst Riley highlights this tension as reason for open dialogue, some pension scheme trustees and sponsoring employers may be questioning why they should engage with unions at all.

However, according to Gowling

Finding middle ground

There are a number of approaches that parties can take when engaging on pension issues. Unite Union's spokesperson, for instance, suggests that parties look to pre-existing collective bargaining arrangements, as well as pension consultive committees or negotiating committees.

Perhaps the most notable of these would be the Joint Negotiating Committee established by the Universities Superannuation Scheme (USS), University & College Union (UCU) and Universities UK (UUK), although Unite points out that this does not currently include all trade unions who represent USS scheme members, and "it should".

Mercer chief actuary, Charles Cowling, also suggests that whilst this is a good approach in this particular case, as USS is in a unique situation, being a very large open scheme with very many different employers, it may not be applicable to other schemes.

"There are few other trustees that have such a significant role in determining future benefit provision to employees," he says. "And probably that is a good thing. The trustees' primary duty is to look after the benefits that have already been promised to employees and are secured by the pension scheme. Trustees generally don't (and probably shouldn't) get too involved in determining future benefit provision to employees. This is generally a matter between employers and employees/unions."

WLG principal associate, Liz Wood, in many situations where changes are made to pension provision, there will be an obligation to consult with representatives of the affected scheme members for a minimum of 60 days.

"Where a trade union is recognised by the employer, such representatives will include the trade union, to the extent that the union's collective bargaining agreement is in respect of the affected scheme members," she explains.

Despite this, Wood acknowledges that there can be a reluctance to engage with the union by employers, regardless of whether there is a legal requirement to do so or not.

"Some employers are worried about their proposed pension scheme change consultation being hijacked by a militant union response," she says, clarifying however, that in the vast majority of cases, involving unions "reaps its own rewards".

Two sides of the same coin

"Representatives can explain the changes to members and, ideally, be supportive of the proposals, either from an early

Focusing on the fiduciary

Unions are increasingly turning their attention to pension scheme investments, whether this is in relation to overarching environmental, social and governance (ESG) concerns, or more scheme specific concerns, as in the case of the App Drivers and Couriers Union and Uber, which raised concerns over the lack of a Sharia-compliant option for drivers.

Gowling WLG principle associate, Liz Wood, confirms that a pension scheme's investment strategy is primarily an issue for the trustees, with unions technically having no 'right' to input into the investment strategy, just as the sponsor has no 'right' to do so, other than through the required statutory consultation on investment strategy.

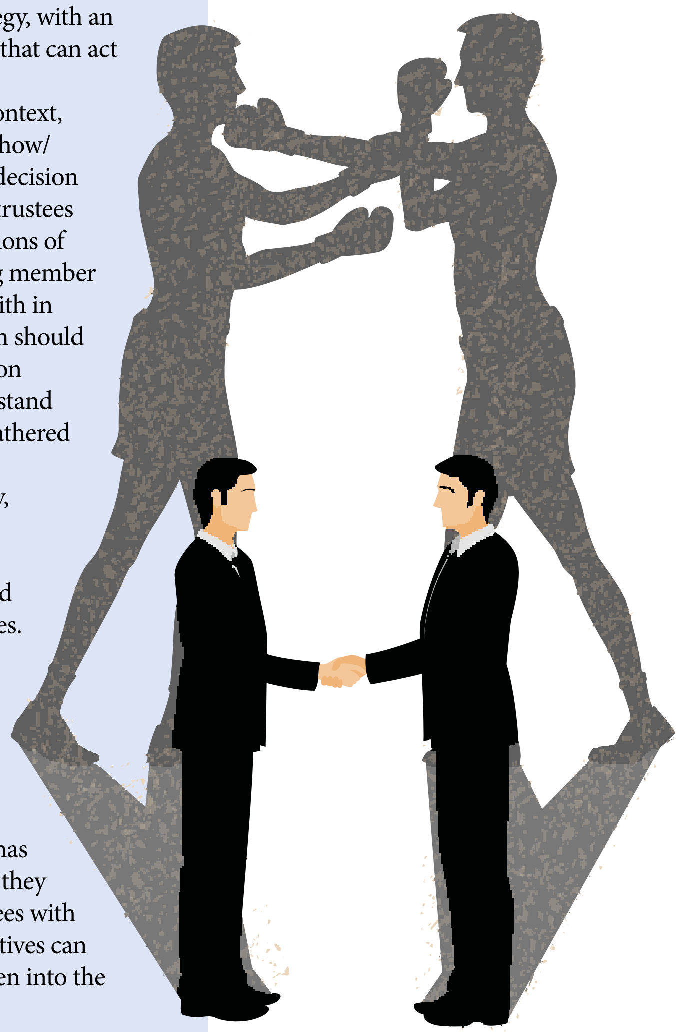
However, she acknowledges that trustees are nonetheless increasingly taking a more holistic approach to their investment strategy, and some trustees are looking to understand their members' views on investment strategy, with an engaged trade union potentially a "useful source of information" that can act as a "conduit for views of the members".

Yet caution is needed, as Wood explains: "In the investment context, regardless of how strongly the union and/or members feel about how/where the scheme's assets should be invested, this is ultimately a decision for the trustees, taking into account their fiduciary duties. Some trustees (and employers) are concerned that involving the union in questions of investment strategy – even if only as an effective way of gathering member views – can create a precedent that the union will be consulted with in future on investment decisions. A measured and careful approach should be taken to any attempts to gauge the union/members' thoughts on investment strategy. In particular, it may be challenging to understand clearly how representative of the whole membership any views gathered by unions are."

This sentiment is echoed by former SPP president, James Riley, who emphasises that whilst unions nevertheless represent "an excellent opportunity for employers and trustees to engage with and understand their members", it is important to understand and respect the role and responsibilities of the pension scheme trustees.

Trustees may need to be prepared for an increased interest in this area though, as a spokesperson for Unite says that whilst the union has already established shareholder resolutions in pursuit of a wide range of change on behalf of its members, "this is likely to continue to grow".

"Having 50 per cent member-nominated trustees on your DB board is a good start. In the DC space the move to master trusts has divorced many members from the governance of their schemes," they state. "Employers should establish pension consultative committees with trade unions, so that trade union member-nominated representatives can fill the void that has been created and keep members rightly woven into the ESG investments in their pension schemes."



stage, or confirm their support during the consultation period, which is more likely to result in a positive outcome and better member engagement," she says. "In many cases, this can offer a valuable boost to the employer's consultation process, because the trade union/staff representative can offer help to affected members in understanding the changes, and feedback members' questions and comments."

Indeed, Jones suggests that unions' pension expertise can help level the playing field a bit, stressing that "it's really important for the members to have somebody in that process whose main interest is looking out for their interests".

Yet, despite these benefits, there are clear concerns around the process, particularly as to whether employers are engaging in these consultations in good faith.

"There is a requirement for employers to consult in good faith, but as far as I can tell, there's no actual kind of enforcement," Jones says, arguing that some employers may not be properly engaging with any member feedback.

Agreeing, Walters stresses that effective consultation involves taking account of, as well as listening to, the views of employees and representatives and must therefore take place before decisions are made. "Making a pretence of consulting on issues that have already been decided is unproductive and engenders suspicion and mistrust about the process amongst staff," he warns.

Commenting in response to these concerns, however, a spokesperson for The Pensions Regulator (TPR), states: "TPR's responsibility is to ensure that the framework is adhered to. We have powers to direct employers to remedy any failures to comply with the duty to consult and to fine them where appropriate."

Even where there is a good faith consultation though, Jones warns that the statutory obligation period is "relatively short" and fails to leave enough time to fully consider proposal changes and develop countermeasures.

This is a concern shared by Unite, which argues that earlier engagement with trade unions and the scheme members they represent is "vital" to give the time that is necessary to allow meaningful consultation to take place.

Going further, it argues: "An extended consultation beyond the minimum or an additional pre-informal consultation stage isn't sufficient because more often then not then sponsoring employers and trustees have already determined their chosen route. Trade unions and the scheme members they represent should be part of the conversation around the potential problems/difficulties that may exist and what the possible solutions could be, rather than being delivered with a fait accompli."

Putting aside differences

Wood agrees that it is better to bring the union along from the outset, rather than having to deal with a union that has not been properly briefed or is involved late in the day, and so is immediately placed on the back foot in discussions and more likely to create challenges.

The position is more nuanced for pension scheme trustees, however, as Wood explains that in most cases, changes to a pension scheme are employer-led.

"The trustees usually have a more passive role in the process, and there would be no obvious reason for the trustees to engage directly with the trade union or staff representatives," she says, clarifying however, that if trustees are concerned that a consultation process led by the employer isn't having sufficient regard for certain staff representatives, be that the trade union or others, it makes sense for the trustees to check with the employer."

Adding to this, Walters emphasises the need to understand the psychology, process and behaviours of the negotiating process, arguing that this can have long-reaching benefits for workers and management alike.

"It will bring the negotiation to a successful conclusion, avoid issues which can escalate into costly industrial action and work towards building a long-term relationship and unity," he says.

"The best pension decision-makers are those who understand the dynamics and challenges of all stakeholders, have a clear view of where they are going and can articulate in the debate. Even better when the scheme has a professional trustee who also understands first-hand the rules of engagement required to get the best outcomes."

Written by Sophie Smith

A first-class template

Perhaps the most obvious example for how the pensions industry, sponsoring employers and trade unions can work together is that of the Royal Mail pension scheme. This has not only had a huge impact for their members, but also for the wider pension landscape.

After first announcing plans for a collective DC (CDC) scheme in 2018, plans for a new Royal Mail collective pension scheme were confirmed earlier this year following a successful consultation process and the passing of the appropriate legislation in the Pension Schemes Act 2021.

TUC policy and campaigns support officer, Jack Jones, highlights Royal Mail and Communication Workers Union as a "really great an example of unions and employers working together", and of having a "really really lengthy" period of engagement. "They are also serious champions of CDC, which obviously is quite a complex thing to get your head around, but they've managed to communicate it in ways that are straightforward, and they've managed to get their members passionate about this," he says. "It's a template other employers could learn from."