



# Honesty is the best policy

## Tom Dunstan talks to Pensions Ombudsman and Pension Protection Fund Ombudsman, Anthony Arter, about the new Pensions Dishonesty Unit and other recent developments for TPO

### What are the main areas that TPO see as issues referred to them? Has that changed or evolved at all in recent years?

**Anthony Arter:** It's stayed constant over the years. The main subject matter of complaints are usually issues dealing with the payment of retirement benefits, misquotes, misinformation, issues with transfers, payment of ill-health benefits.

We are seeing a gradual increase in the number of auto-enrolment cases where contributions haven't been paid. This is a combination of factors. There are now millions of employees that are or should have been auto-enrolled, a considerable number. Many small businesses are struggling as a result of the Covid pandemic, which has resulted, in some cases, of pension contributions not being paid into an appropriate pension arrangement.

### Was it these trends that made you feel the Pensions Dishonesty Unit (PDU) needed to be created?

**Arter:** The number of pension scams has steadily increased over the years, but it was the number of high value determinations I have dealt with recently, that made me want to establish a dedicated

PDU to investigate allegations of serious breaches of trust, the misappropriation of pension funds and dishonest or fraudulent behaviour by pension scheme trustees.

The most important case that made me realise how important it was to establish this unit concerned the three Norton Motorcycles schemes, which had been set up by Mr Garner, the owner of the Norton Motorcycle company. Over £10 million of members' pension savings were lost. I decided that the best the way to deal with this case, in order to provide a remedy for all of the schemes' members, would be to use the independent trustee, Dalriada, who had been appointed by The Pensions Regulator.

I was able to determine the whole case for all 274 members of the three schemes rather than just the 31 members who had complained to me. That scheme was really the catalyst for me to recommend the unit's establishment. Having a specialised unit focusing on

these types of cases, not just for the few people that might complain to us, but for all the members of a scheme.

I believe that the establishment of the PDU, using the civil standard of proof, is such an important advance for the public, but also for the industry as a whole, supporting the vast majority of excellent trustees and well-run schemes and deterring those trustees who have an ulterior dishonest motive. For me it's part of the jigsaw that's missing between The Pensions Regulator (TPR), with regulatory powers and criminal sanctions, and the Pension Protection Fund's Fraud Compensation Fund.

### Can you please explain more about the dishonesty unit – how it's structured, how it works and how it sits within the wider TPO office?

**Arter:** It's a specialist unit that sits within our casework directorate. It is made up of a team manager, senior adjudicators, lawyers, senior counsel, and the head of adjudication. The cases are referred to us directly by members and independent trustees and indirectly by TPR and the Pension Protection Fund.

There are two potential primary workstreams. The first is against individual trustees and for these cases there are generally no obstructions to making findings against the trustees. They must have a fair opportunity to

defend themselves against a finding by me of personal liability.

The second workstream is complaints made against corporate trustee companies that requires me to pierce the corporate veil to make a direction against directors. Now, that is a challenge from a legal perspective as it is a high bar to make findings against individual directors in a personal capacity.

In both cases the approach is to assess the investment decisions of the trustees and whether those investments were made to the detriment of the members and in breach of trust, legislation and/or common law.

➤ **It is currently running on a pilot basis – how long will this trial run for and what will you be assessing during this?**

**Arter:** It's currently due to run until November this year. The success of the unit will be determined on a number of measures, and this includes the amount of money that is recovered and paid back into the scheme, the contribution to success for regulatory and enforcement action, and the assistance provided to other tribunals/Fraud Compensation Fund.

➤ **What are the types of cases you expect to deal with within the dishonesty unit?**

**Arter:** Typically, it will be cases where a member was persuaded to transfer into a trust-based occupational pension scheme, established to allow the members to invest in high yield but actually unregulated high risk and unusual investment arrangements. The investments will often be set up with a high level of sophistication to make them appear legitimate.

A trustee acting with appropriate regard for the members' interest would not have selected those investments and would have sought professional advice. So, there are various facets of behaviour that can constitute dishonesty or fraudulent conduct in the context of

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trustees' duties. Often the investments will have, by the time the case comes to me, little or no value. Other types of cases might involve the purchase of shares in the sponsoring employer company, as was the case in Norton Motorcycles, which I mentioned earlier, with the pension monies used to keep a company afloat.

➤ **Can you give any broad examples of the work it has undertaken so far?**

**Arter:** At the outset there were 33 cases identified as appropriate for consideration by the PDU. We must be reasonably sure we can recover members money before devoting finite resources. My determinations are not limited in the redress I can award in respect of loss.

Since November last year, we have had a further 20 cases referred to the unit. Over £37 million has been fraudulently taken from the schemes we are investigating.

To date I have held three PDU oral hearings, which has allowed me to reach a decision on whether the trustee has any personal liability to repay the monies lost by the members.

Once I have made a determination there is then the question of enforcing it where a trustee does not comply with my directions. We are now considering, on a case-by-case basis, whether it is appropriate for TPO to assist the members, or for members to take

their own action. We have currently two enforcement actions that we have submitted to the high court on behalf of members.

➤ **Assuming the pilot goes well, what benefits do you expect to have from the unit; what difference do you hope it will make in the long term?**

**Arter:** Repayment by the wrong doers of the lost pension savings successfully enforced through the courts. A contribution to related successful regulatory and enforcement activity, for example: the insolvency service; director of disqualifications; TPR prosecutions; TPR appointment of independent trustees where decisions previously have been taken not to make one; findings of dishonesty adopted by other tribunals/Fraud Compensation Fund; and improved customer service and members'/stakeholder feedback. What's very important though is evidence of a change in trustee behaviour, to really deter fraudsters setting up these pension arrangements.

➤ **Are there any other developments in the pipeline for TPO, or any other plans for how it'll structure its workload in the future?**

**Arter:** Last year, despite Covid, we had a 6 per cent increase in our efficiency through streamlining our systems and changing our approach to casework. This year it's been 10 per cent, and that's without any increase in resources. Unfortunately, that doesn't keep up with the increasing demand – the increasing number of complaints that we receive.

We have recently been given some additional funding to assist in dealing with our ever-increasing demand. This provides an opportunity for new approaches to casework and further streamlining of the way in which we triage cases, and this feeds into our model for continuous improvement without loss of quality.

➤ **Written by Tom Dunstan**