The last few months have seen two cases brought before the Pensions Ombudsman in which pension scheme trustees were held personally liable for losses to the pension fund. So, has it really become so unsafe to be a pension fund trustee? Should they be resigning en masse?

Whilst these recent cases may appear worrying for anyone who is a trustee, there are a number of ways in which trustees can be protected from personal liability. One method of protection which most trustees will be familiar with is an insurance policy where an insurance company offers protection to trustees against personal liability they might incur.

Many scheme rules also contain protection for trustees. There are two types of protection: indemnity provisions and exoneration provisions and whilst these provisions are often considered together, they have very different effects.

**Indemnity vs exoneration**

In simple terms, under an exoneration clause a trustee will not be liable for an act or omission; under an indemnity clause the trustee is liable for the act or omission or for other costs relating to that act/omission, but a third party takes responsibility for that liability. Current case law does not allow exoneration rules to cover fraud, deliberate breach of trust or recklessness. The problem then lies in deciding whether a trustee’s actions (or failures to act) amount to a deliberate breach of trust or recklessness. The burden of proof is on trustees...
to show that any exoneration clause applies and is sufficiently widely worded to cover their actions.

An indemnity will usually be provided by either the employer or the pension fund and will generally be worded to cover the same ground as the exoneration provisions. If the trustee is exonerated, then he will usually be able to claim back the costs of defending himself – either from the employer or from the pension fund itself. The problem with indemnities is that they are only as good as the person who undertakes to pay out. If the indemnity is given only by the employer and that employer does not have the funds to pay, the trustees effectively lose the benefit of the protection.

What if the scheme rules don’t include these provisions?

Although these provisions are very common, they are not universal and schemes may include one but not the other.

There should be little problem in amending the rules to allow for an indemnity to be provided by an employer, but can trustees reasonably amend the rules to include an exoneration for themselves or an indemnity from the pension fund itself? Trustees would need to consider this carefully before making any such amendment.

On the face of it, such rule changes do not seem to be in the best interests of the members as they appear only to benefit the trustees. However, as the role of a pension scheme trustee becomes ever more onerous, a lack of protection against the cost of defending breach of trust claims could discourage individuals from coming forward as trustees and so work to the detriment of the scheme as a whole.

Statutory exoneration

Under the Trustee Act 1925 the courts have the power to excuse trustees if they have acted honestly and reasonably and ought fairly to be excused.

What else can you do?

A trustee can usually maximise protection against personal liability by taking appropriate professional advice, complying with the Pensions Regulator’s requirements and properly documenting key decisions and factors taken into account in exercising trustee powers.

However, recent Pensions Ombudsman determinations do also serve as a cautionary reminder that a trustee can be found personally liable.