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Essential UK Pensions News

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Introduction

Essential Pensions News covers the latest pensions developments each month.

Corporate Insolvency and Governance Act 2020

The Corporate Insolvency and Governance Act 2020 was introduced as a Bill in the House of Commons on May 20, 2020 and obtained Royal Assent on June 25, 2020. Almost all its provisions commenced on June 26, 2020, although most of the temporary business protection measures it introduces have retrospective effect from March 1, 2020 and are currently extended to September 30, 2020.

The Act includes a number of measures aimed at providing flexibility and breathing space to businesses to continue trading during the period of economic uncertainty arising from the COVID-19 pandemic. We have outlined below the key aspects of the new legislation relevant for pension schemes. For further details please see our July 2020 briefing.

Which of the Act's measures are most relevant to pension schemes?

The key measures which are relevant for pension schemes as unsecured creditors are outlined below.

- **Company moratorium** - a new standalone moratorium, where the directors will remain in control of the company under the supervision of a monitor (a licensed insolvency practitioner) whilst they seek to rescue the company.
  The moratorium will last for an initial period of 20 business days but may be extended without creditor consent for a further period of 20 business days. Further extension for up to a year or more is possible with creditor consent or by a court.
- **Restructuring plan** - new restrictions on certain suppliers to companies in a moratorium or administration terminating contracts, allowing struggling solvent and insolvent companies to propose a rescue plan as an alternative to the liquidation of the business.

Both the new restructuring plan and the new moratorium are aimed at business rescues leaving directors in control and they represent a move away from creditor-led insolvency processes. However, neither of these new measures would be an 'insolvency event' for the purposes of the pensions legislation, and would not trigger a Section 75 employer debt, or the intervention of the Pension Protection Fund.

Amendments to the Bill

Draft amendments to the original Bill, including those relating to pension schemes, were published, debated and passed in the House of Lords on June 23, 2020.

The amendments provided that, during a moratorium, the PPF will be given rights to information and the right to challenge the actions of the directors and/or the monitor on a restructuring plan. Both the PPF and the Pensions Regulator will be entitled to receive copies of all the information sent out to creditors. On both procedures, creditor rights can be provided to the PPF.

A further key change from the original Bill was that accelerated pre-moratorium debts triggered in relation to a debtor's financing arrangements are not afforded super-priority status or protection. Concerns had been expressed that affording priority to finance debts over unsecured creditor claims such as those by pension trustees (even where these have been secured by a floating charge) could not have been intended.

Comment

The amendments aim to ensure that both the PPF and the Pensions Regulator take a key role in the moratorium and restructuring processes under the Act, and that the interests of a pension scheme are represented in any company recovery plans. The changes have been welcomed by the PPF, as they ensure its involvement at an early stage, allowing it to work to influence the outcome and mitigate the risks for both itself and scheme members it exists to protect.

In addition, the amendments preventing accelerated financial services debts from benefiting from super-priority have gone some way towards allaying concerns that the new company moratorium, designed to afford struggling companies leeway to develop a rescue plan, would lead to unsecured lending being given super-priority status over unsecured liabilities such as DB schemes.

A further concern remains for pension schemes in relation to the class of '*pre-moratorium debts*' for which a company would obtain a payment holiday during a moratorium. One of the categories of exclusion is for '*wages or salary arising under a contract of employment*', a class that includes occupational pension scheme contributions. This raises questions about whether or not it covers the employer contributions, and whether that extends to those in respect of auto-enrolment.It is even less clear whether it is broad enough to cover deficit recovery contributions.

What is more, many of the provisions in the Act appear to be in direct conflict with some of those in the Pension Schemes Bill, which completed its third reading in the House of Lords on July 15, 2020, and which will progress to the House of Commons later this year. As things stand, the new criminal offences to be introduced under the proposed pensions Bill - of the offence of avoidance of employer debt and the offence of conduct risking accrued scheme benefits - do not sit well with the new insolvency protection provisions outlined above.

However, for all the imperfections of the Corporate Insolvency and Governance Act, (and such rushed legislation could never realistically have provided the ideal solution for all concerned), the positive view for DB schemes and the PPF is that the new law is designed to help viable businesses survive the COVID-19 pandemic and the related economic crisis. If this is achieved, DB schemes, their members and the PPF are likely to benefit in the long term from these measures.

COVID 19: Pensions Regulator updates various parts of its online guidance

On June 16, 2020, the Pensions Regulator published some changes to its COVID-19 guidance for pension scheme trustees and employers. These are outlined below but for further detail, please see our June Stop Press. Most of the original guidance remains relevant but is consolidated with some alterations and limited extensions to certain reporting obligations.

Defined benefit schemes

Updates have been made in the following respects:

Deficit repair contributions – the original guidance confirmed that trustees could agree to a reduction or suspension of DRCs in order to support the scheme employer, subject to certain restrictions. The Regulator confirmed it would take no action regarding failure to pay DRCs for the three months from March 20, 2020. The update acknowledges that this facility will still be needed by many schemes but is revised to note that the Regulator expects that most trustees should now be able to undertake more accurate and detailed due diligence on the employer's financial position before agreeing a new suspension or reduction.

Transfer values – the Regulator is aware of a limited suspension of transfers by schemes, but states that the suspension of the requirement to report delays in the transfer value process will be lifted. The reporting of breaches resumed from July 1, 2020. It also requires that trustees continue to provide its standard letter to members looking to leave their DB scheme.

Employer covenant – the Regulator takes the view that there should now be sufficient financial information available to allow trustees to more accurately review the employer covenant. Trustees should assess whether any adverse affordability effects of the pandemic on the employer's covenant are likely to be short-term or more permanent. Decisions on risk should then be reconsidered based on this knowledge. The revised guidance includes questions for trustees to help assess the covenant impact of COVID-19.

Reporting easements – most of the reporting easements that were granted to schemes ended on June 30, 2020. As well as in respect of the suspension or reduction of DRCs, and any delays in transfer values, trustees should also continue to report on any delays to finalising a scheme's scheme valuations and any revisions to the recovery plan, with a suitable explanation for trustees' actions.

View the updated DB funding and investment: COVID-19 guidance for trustees

View the updated DB scheme funding – COVID-19 guidance for employers

Defined contribution schemes

Changes to the guidance that apply to DC schemes are outlined below:

Late payments – the Regulator will continue to allow DC and automatic enrolment providers 150 days to report late payments of contributions, rather than within the original 90 days. This will be reviewed at the end of September 2020.

Annual benefit statements – the Regulator will continue to take a pragmatic approach to delays in the issue of annual benefits statements, accepting that schemes need additional time to issue these to members.

Master trusts – from June 30, 2020, master trusts should return to issuing a formal report to notify the Regulator of all triggering and significant events.

View the updated COVID-19: an update on reporting duties and enforcement activity.

Regulator publishes interim guidance on DB consolidating superfunds

On June 18, 2020, the Pensions Regulator published guidance to assist those setting up and running a defined benefit "superfund". The guidance outlines the standards it expects superfunds to meet before starting to operate, and in advance of the legislation being in place. The DWP's consultation on superfunds closed in February 2019, and the Regulator also published its response on June 18, 2020.

Under the new regime, participating employers will no longer be responsible for scheme funding liabilities following the transfer. The scheme employer is to be replaced by an employer who is a special purpose vehicle (preserving the scheme's PPF eligibility) or the liability of the employer to fund the scheme's liabilities is replaced by an employer backed with a capital injection to a capital buffer (generally created by investor capital and contributions from the original employers).

Companies considering a transfer to a superfund can expect the Regulator to request information about four key areas to ensure a smooth transition:

- **Supervision** - evidence will be required to show that the superfund is capable of being supervised. Funds themselves will need to be registered with HMRC and be able to explain why the fund is eligible for the PPF.
- **Governance** - the superfund must be run by fit and proper people and have effective governance arrangements in place. The Regulator expects those carrying out certain key functions to be able to demonstrate that they have the right level of knowledge, skills and experience to carry out their role as well as "an appropriate level of propriety".
- **Capital requirements** - the superfund must be financially sustainable and have adequate contingency plans in place to manage funding-level triggers as well as to ensure an orderly exit from the market. It will be required to be funded on a prudent basis and have a capital buffer.
- **Administration** - the superfund must have sufficient administrative systems and processes in place to ensure that it is run effectively.

Part of the process will also involve transferring employers applying for clearance.

Pensions Regulator sets out revised corporate plan for 2020 to 2021

On June 29, 2020, the Regulator published its corporate plan for 2020–21, which sets out its priorities for the year ahead. The Regulator says its plan has been adjusted to reflect the realities of how the pensions landscape has changed as a result of the COVID-19 pandemic.

Its Chief Executive Charles Counsell commented: "*Our plan outlines our re-aligned priorities and targets in light of COVID-19. But it also highlights we will not be blown off course and that our standards remain crystal clear. We are unwavering in our approach and we will continue to protect savers by using our powers to tackle those who flout the law, embracing new powers and continuing to forge stronger relationships with schemes so we can continue to support them and be clear what we expect of them.*"

The Regulator has been working to develop a Corporate Strategy which builds on the strong base of its Future Transformation programme and sets out a clear vision for what it wants to achieve over the next 15 years. This was due to be published for discussion with key stakeholders when the pandemic hit, so the Regulator postponed its launch and reviewed its strategy. The plan is now to relaunch at an appropriate time later this year.

The Regulator commented when it published its belated DB Funding Statement in April 2020 that it believes its consultation on the new DB funding regime remains relevant. It intends to keep its corporate plan and priorities under review as the impact of the pandemic develops, and may publish revised intentions later in the year as necessary.

Its five priorities for the year are:

- Protect pension savers across all scheme types through proactive and targeted regulatory interventions.
- Provide clarity to and promote the high standards of trusteeship, governance and administration the Regulator expects, and it expects to consult on the implementation of a single code of practice towards the end of the year.
- Intervene where appropriate so that DB schemes achieve their long-term funding strategy and deliver on pension promises.
- Ensure jobholders have an opportunity to save into a qualifying workplace pension through automatic enrolment.
- To continue to meet the future challenges it faces as Regulator.

There is also a financial summary showing an underspend in 2019/20 and increases in both the spend forecast for 2020/21 and staff numbers.

Money and Pensions Service (MAPS) publishes 2020/21 Corporate Plan with focus on COVID-19 pandemic strategy

On June 16, 2020, the MAPS published its 2020/21 Corporate Plan. Originally scheduled to be available in April, publication was postponed so that the MAPS could consider how priorities could be "flexed" in response to the COVID-19 pandemic.

The plan acknowledges the negative influence of the pandemic on the financial wellbeing of consumers. It outlines several initiatives which have been launched to help low income and minority workers who have been particularly adversely affected by the COVID-19 crisis. One such initiative is to increase the capacity for rolling out money guidance and advice, and the MAPS' work is being supported by a £34.8 million increase in funding from HM Treasury.

The MAPS has updated the guidance and support it offers to consumers and has developed a new Facebook group, "Coronavirus and your money". It has also brought together over 140 partners and stakeholders to develop a co-ordinated response to support consumers impacted by the pandemic in both the long and short term.

Beyond the pandemic, the MAPS provides a framework for the development of the UK Strategy for Financial Wellbeing. Introduced in January 2020, the strategy aims to encourage five million more workers to save for later life.

Department for Work and Pensions consults on its review of the Default Fund Charge Cap and Standardised Cost Disclosure

On June 25, 2020, the DWP published a call for evidence seeking views on the effectiveness of costs, charges and transparency measures in protecting pension member outcomes.

The document progresses the commitment made by the Government following the 2017 review of the charge cap to re-examine the scope and level of the charge cap in 2020, and to review permitted charging structures. This call for evidence seeks views and evidence on:

- The level and scope of the charge cap applicable to the default arrangement within certain Defined Contribution pension schemes used for auto-enrolment.
- The appropriateness of permitted charging structures and the extent to which they should be limited.
- Options to assess take-up, and widen the use of standardised cost disclosure templates.

The deadline for responses to this consultation is August 20, 2020.

FCA publishes consultation and review on pensions value for money

On June 24, 2020, the Financial Conduct Authority published a consultation on proposals designed to make it easier for Independent Governance Committees (IGCs) and Governance Advisory Arrangements (GAAs) to compare the value for money of pension products and services.

The FCA has also published a review examining how IGCs and GAAs ensure members of workplace personal pension schemes receive value for money, which found a lack of consistency in the way IGCs and GAAs operate. As a result of the review, the FCA has sent feedback letters to companies to ensure they make improvements to the way they work with their IGC or GAA.

The consultation closes on September 24, 2020.

GMP Equalisation Working Group launches Data Guidance

The cross industry GMP Equalisation Working Group, which is chaired by the Pensions Administration Standards Association (PASA), has published guidance on the data required for GMP Equalisation.

The guidance looks at all the data aspects of a GMP equalisation project and seeks to provide support to trustees in relation to the steps they can take to prepare their scheme for equalisation.

The main areas covered in the guidance are:

- Data required and data availability – as part of the equalisation process, trustees need to consider what data is readily available, what data could be obtained and what data is unlikely to be obtainable, and to factor these considerations into their process.
- Member groupings – trustees need to decide whether all members should be dealt with at the same time, or whether it is better to deal with some members first (for example, those who are materially impacted).
- Adviser input – trustees need to engage with the necessary advisers and ensure that the parties communicate effectively with one another.
- Consistency and efficiency – trustees should consider the need for decisions in relation to GMP equalisation to be consistent with other decisions, for example, in relation to *Barber* equalisation and GMP reconciliation and rectification projects.
- Calculation options – trustees should consider which option for how to calculate the post May 16, 1990, GMP and non-GMP elements for the opposite sex is best suited to their particular scheme and the data available.

See the guidance for further details.

Update on progress of the Pension Schemes Bill 2019/21

The Pension Schemes Bill 2019-21 received its third reading in the House of Lords on July 15, 2020, and will progress to the House of Commons later this year.

The key amendments relate to the new provisions on trustees' governance duties in relation to climate change risk. These provisions are designed to ensure occupational pension schemes act and report on their exposure to the effects of climate change in line with the recommendations of the industry-led Taskforce on Climate-related Financial Disclosures.

According to the DWP, the latest amendments are intended to clarify the ways in which the new powers may be used. The amendments specifically refer to the 2015 Paris Agreement on climate change (and other climate change goals) as matters that trustees and managers of occupational pension schemes may be required to take into account within their governance of climate change risks. They may also be required to adopt "prescribed assumptions" about future events, which may include assumptions about climate change goals.

Further amendments to the Bill have been tabled that will:

- Require the MAPS to provide information about members' entitlements under occupational and personal pension schemes by means of a pensions dashboard service. Two amendments affect pensions dashboards. The introduction of commercially driven dashboards will be restricted until the MAPS' Service's dashboard has been running for a year. Dashboards are also prevented from being used for financial transactions "*before Parliament has had the opportunity to consider the matter and approve this through primary legislation*".
- Amend the Bill's regulation-making powers concerning collective DC schemes, and most regulations must now be made under the affirmative resolution procedure. Trustees of collective DC schemes will be required to produce for members a report of their assessment of the fairness of the operation of scheme.
- Add additional limitations to the circumstances where a member of an occupational or personal pension scheme may exercise their transfer rights. Current restrictions provide for details to be provided regarding the member's employment or place of residence. Under further Government amendments, the member must provide evidence to the trustees that they have obtained information or guidance from the MAPS before they act on a transfer.

The House of Lords also expressed a desire for the Regulator to treat open DB schemes differently to closed schemes in terms of funding and investment, and to ensure that open schemes' closure was not hastened further.

It remains to be seen if further amendments may be considered when the Bill reaches the House of Commons. A proposed amendment to the criminal offences provisions making them applicable only to persons connected to the scheme employer or the scheme itself was withdrawn from the Lords' debate. As drafted, they do not sit well in the light of the new company moratorium and restructuring provisions implemented under the Corporate Insolvency and Governance Act 2020 (see above).

Auto-enrolment provisions relating to seafarers and offshore workers

Secondary legislation has been published to ensure that the auto-enrolment regime continues to include eligible workers in the maritime industries.

The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2020 and the Automatic Enrolment (Offshore Employment) (Amendment) Order 2020 apply respectively to seafarers and offshore workers involved in oil or gas extraction. Both instruments came into effect on June 30, 2020. They remove sunset provisions in existing legislation that would otherwise have taken effect on July 1, 2020.

The changes are intended to ensure that auto-enrolment will continue to apply to seafarers and relevant offshore workers who are working, or ordinarily working, in the UK.

HMRC publishes issue 121 of the Pension Schemes newsletter

On June 25, 2020, HMRC published its most recent Pension Scheme newsletter. This edition highlights temporary changes to pension processes as a result of COVID-19, which are outlined below:

- Where filing and payment deadlines for the accounting for tax (AFT) returns for the quarters ending June 30, and September 30, 2020, are missed, HMRC can be contacted and will cancel any interest and penalties, as they did for the quarter ending March 31.
- Previously communicated temporary changes will apply until the end of October 2020.

Further news on the Managing Pension Schemes Service is also set out in the newsletter.

HMRC's GMP equalisation newsletter – July 2020

In our March update, we referred to HMRC's February GMP equalisation newsletter which provides guidance on pension tax issues arising when equalising benefits for GMPs, to supplement that in the Pensions Tax Manual.

In its July newsletter on GMP equalisation, HMRC provides guidance on some specific issues which arise in relation to certain types of lump sum payments. Helpfully, HMRC has confirmed that where lump sums have previously been paid where there is a requirement for the lump sum to extinguish a member's rights under the scheme (for example, in relation to serious ill-health lump sums and trivial commutation lump sums), this means that the lump sum should have extinguished all benefits or rights that could reasonably have been known about at the time of the payment. HMRC confirms that the lump sum payment will not be unauthorised simply because, due to the issues surrounding GMP equalisation, further entitlement is identified at a later date which the scheme administrator could not reasonably have known about at the time of payment.

HMRC also confirms in relation to lump sum payments where there is a limit on the amount of the payment (for example, a winding-up lump sum, a trivial commutation lump sum death benefit or a winding-up lump sum death benefit) that this relates to the amount of the actual payment. Provided that the amount of the lump sum was within the relevant statutory limits at the time of payment, the lump sum will not become unauthorised simply because further entitlement is identified at a later date.

However, in relation to trivial commutation lump sums, the limit for the amount of the payment is based on the member's rights under all registered pension schemes on the "nominated date" (as opposed to the limit being based on the amount of the lump sum actually paid). HMRC states that "*GMP rights were accrued before 6 April 1997, so the value of the member's pension rights on the nominated date includes the 'equalised GMP' rights. This is consistent with the position for valuation of rights for annual and lifetime allowance purposes. It may be that as a result of equalising GMP rights the value of the member's rights on the nominated date is found to be more than the relevant limit. If this is the case the original lump sum payment cannot be a trivial commutation lump sum. Unless the lump sum can meet the payment conditions for another type of authorised payment, for example a small lump sum, the payment will be unauthorised.*"

The newsletter also provides guidance on whether top-up payments can be made in relation to particular types of lump sums where further entitlement is identified as a result of GMP equalisation.

Comment

This newsletter provides guidance to schemes on a number of specific GMP equalisation issues which have been much debated in the industry. However, the position in relation to trivial commutation lump sums may create administrative difficulties and negative tax implications where members received lump sums which were very close to the £30,000 limit and where further entitlements have been identified as a result of GMP equalisation.

Univar UK Ltd v Smith and others [2020]: High Court rules 'drafting errors' allow switch from RPI to CPI

The High Court has granted rectification of scheme rules on inflation-linked pension increases for the defined benefit section of the Univar Company Pension Scheme. This means that references in the rules to the statutory basis of increases means the scheme can use the Consumer Prices Index, rather than the generally higher Retail Prices Index, to calculate increases to pensions in payment and revaluation of pensions in deferment. The impact on the scheme's funding position will be a potential saving of about £23 million.

The rectification claim was brought by Univar UK Ltd, the scheme's principal employer. Relief was sought on the basis that the express link to RPI in the scheme rules (often known as a "hard-wired" RPI rule) had been introduced by a mistake in drafting during a scheme document consolidation exercise in 2008. The previous version of the rules had linked increases to statutory requirements, and the subsequent hard-wiring would not have caused a problem until 2010 when the inflation index in the statutory formula was switched from RPI to the (usually lower) CPI.

On the main issue, the Court found that neither the employer nor the trustees intended to change the increase rule. The judgment considers the background in great detail, and the Judge made his findings having regard both to the contemporaneous documents and oral witness evidence.

The Court applied the subjective test of common intention for rectification and considering the collective intent of those making the decisions at the time. Of particular importance was advice from the scheme's then advisers, who admitted the mistake. The judge held that negligence "*not only does not prevent rectification, but is a ground for it*".

In his verdict, the Judge, cited precedents such as the Court of Appeal's 2019 decision in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd*, in which it was said that "*where an important change is made to an existing arrangement between the parties, the absence of any discussion of that change may itself be evidence that the parties did not intend it*".

Much of the case then hinged on whether a lack of evidence proving that the employer was aware of the legal implications of the new wording constituted proof that it had been made by mistake. The Judge was ultimately satisfied that the effect of the new wording in the consolidation was unintended, saying: "*In my judgment, the company has established that neither it nor the trustees actually intended that the pension increase rules in the 2008 [deed and rules] should have the legal effect that they did*."

Comment

The judgment provides a useful statement of the principles of rectification. None of the parties appreciated that the CPI might be introduced as an alternative statutory index, and to that extent did not foresee that there was a possibility that the RPI might at some point no longer be the minimum requirement for statutory indexation.

The employer had not appreciated the legal effect of hard-wiring RPI into the rules, so the Judge concluded that it would be fair to assume the change did not accurately reflect the collective intent of the company in making the changes it did.

The judgment will be generally welcomed by the pensions industry as it has confirmed that any negligence by those drafting rule changes could be a ground for rectification.

For many schemes, there are significant funding differences depending on whether their benefit increases are calculated on the RPI or CPI basis. In our May 2020 update, we reported on the *Arup* case where a switch from RPI to CPI could have reduced that scheme's deficit by as much as £85m.

While the High Court judgment in *Univar* does not provide the firm precedent that many scheme employers seek, it does open the rectification door a little in circumstances where a scheme's rules allow. This case differs from many of the previous RPI/CPI claims in that rather than focussing on the precise legal interpretation of the increase rule, the claim was brought on the basis that a drafting error had mistakenly hardwired RPI into the rules. The decision highlights how essential it is to record the intentions and decisions of all the parties when rule amendments or document consolidations are undertaken.

Hughes v Board of the Pension Protection Fund [2020]: High Court rules PPF compensation cap is age discriminatory

In a judgment handed down on June 22, 2020, the High Court held that the statutory cap on pension compensation provided by the Pension Protection Fund is age discriminatory. The Court also found that the PPF failed to give proper effect to the 2018 judgment of the EU Court of Justice in *Hampshire*.

As a reminder, the PPF pays compensation of 100 per cent of the scheme benefits for those members who have attained the normal pension age (NPA), or 90 per cent of the scheme benefits for those members below NPA

on the date the assessment period begins. In addition, there is an upper ceiling or cap on the compensation payable to the latter group. The cap was initially fixed at £27,777.78 in 2005. It has been increased in line with earnings and was £40,020.34 in 2019/2020.

Those who were below NPA at the start of the assessment period, and whose compensation is capped, receive 90 per cent of the amount of the compensation cap not 90 per cent of the value of their accrued pension entitlement.

The CJEU's judgment in *Hampshire* confirmed that every employee or former employee must receive at least 50 per cent of their accrued pension entitlements in the event of their employer's insolvency. In late 2018, the PPF announced the steps it would take to comply with the *Hampshire* judgment and its approach was challenged in the *Hughes* case.

The claim succeeded on two grounds.

First, the Judge found that the cap on compensation in the 2004 Act involves unlawful age discrimination. While the cap introduced in 2004 had the legitimate aims of addressing "moral hazard" and cost, it was not an appropriate means of achieving those aims and was not objectively justifiable.

Second, the Judge held that the PPF had failed properly to implement the CJEU's judgment in *Hampshire*. The PPF had attempted to use a one-off calculation designed to ensure that the value of the PPF compensation payable to any pensioner during their expected lifetime would be no less than half of the actuarially assessed value of their original scheme benefits. This wrongly left open the possibility that, over time, some pensioners would receive less than half of their scheme benefits, for example, if they lived for longer than the PPF had estimated. The Court found that EU law required the PPF to put in place measures to identify and remedy that possibility in any individual case where it might arise. The precise mechanism by which the PPF is to achieve that is a matter for it to decide.

The Court found that the question of what interest might be payable would be better dealt with in the context of a specific claim or claims, based on evidence where the relevant facts could be identified. As the evidence in this case was sparse and related to only a small number of claimants, interest was not dealt with in this judgment.

Comment

The judgment means that thousands of former employees of insolvent companies who had seen their pensions slashed by up to 70 or 80 per cent will now receive up to 90 per cent of their pension, including arrears, as well as a guarantee that they will receive no less than half of the value of their original pension benefits throughout their lifetime.

The PPF has responded to this judgment stating that it will work with the DWP to decide on the next steps; and in the meantime, will continue to pay PPF members their current level of benefits. It is currently facing multiple challenges in terms of EU case law, the reform of RPI and a reduction of receipts from levy paying schemes.

The PPF has not yet confirmed whether it will appeal this judgment, or if there could be a challenge to the current 90 per cent level of compensation to those under NPA.

Re Prudential Assurance Company Ltd [2019] EWHC: Update on appeal of 2019 High Court decision refusing to sanction insurance business transfer of annuity portfolio

In our September 2019 update, we reported that the usually predictable world of portfolio transfers had received a jolt on August 16, 2019, when the High Court declined to exercise discretion to sanction the proposed insurance business transfer of a £12.9 billion book of in-payment annuities from The Prudential Assurance Company Limited to Rothesay Life Limited. This was believed to be the first time ever that the Court has refused to sanction a Part VII scheme that had been passed by both the independent expert and the insurance regulators, the Prudential Regulation Authority and the Financial Conduct Authority.

The parties lodged a notice of a joint appeal at the Court of Appeal, and this was due to be heard on July 7, 2020, but was delayed due to the COVID-19 pandemic. The appeal is now expected to be heard in October 2020, although this has yet to be confirmed. If the appeal is successful, there will be a further hearing at the High Court to decide whether the proposed transfer should be approved.

Safeway Ltd v Newton and others [2020] EWCA Civ 869

The Court of Appeal has reached a decision on the one remaining issue in the appeal relating to the date of the equalisation of NPAs for men and women in the Safeway Pension Scheme (the Scheme). Previously, men had an NPA of age 65 and women had an NPA of age 60. The Scheme issued an announcement on December 1, 1991, but a deed of amendment was not executed until May 2, 1996. The principal employer, Safeway Limited, had accepted that equalisation was not effective retrospectively to December 1, 1991. The issue at this stage was whether Section 62 of the Pensions Act 1995, which came into force on January 1, 1996, had an effect on the date of equalisation.

In a previous judgment, Warren J had concluded that the amendment equalising NPAs could not be retrospective to December 1, 1991, because of the overriding effect of Article 119, which sets out the principle of equal pay (a position which was now accepted by Safeway Limited). The Court of Appeal referred specific issues arising from Warren J's judgment to the Court of Justice of the European Union (CJEU), which confirmed that an amendment disadvantaging a class of member could not be made retrospectively because of Article 119.

In its judgment, the CJEU described three periods of service which needed to be considered:

- Period 1 – pre-*Barber* service where there was no requirement to treat men and women equally.
- Period 2 – the period from 17 May 1990 until the Scheme adopted measures to equalise the treatment of men and women. During this period, the Scheme is required to "level up" benefits (i.e. to treat men as having the lower NPA of age 60).
- Period 3 – the period after the Scheme adopted measures to equalise the treatment of men and women. In this period, the Scheme is able to "level down" benefits (i.e. to treat women as having the higher NPA of age 65).

The issue for the Court of Appeal was how to determine when Period 2 ended and Period 3 began. In paragraph 27, based on the CJEU's decision, the Court of Appeal summarised that *"to be sufficient to close the Barber window, the measures must be immediate, full, unconditional and legally certain (in the sense they must be sufficiently precise, clear and foreseeable to enable the persons concerned to know their rights and obligations, and to rely on those rights before national courts)."*

Section 62(1) provides that an occupational pension scheme which does not contain an equal treatment rule shall be treated as including one. The Court of Appeal held that Section 62 conferred enforceable rights on members to equalise "levelled up" benefits and that it met the criteria to close the Barber window. The Court of Appeal agreed with Safeway's argument that prior to January 1, 1996, Article 119 prevented the "levelling down" of benefits, but from this date onwards, the issue became a matter of domestic law under Section 62. Safeway submitted that as a matter of domestic law alone, the 1996 deed of amendment was effective in levelling down the NPAs of men and women with effect from December 1, 1991. This was rendered null by Article 119 but only until January 1, 1996, when this became a matter of domestic law. Therefore the 1996 deed of amendment was effective in levelling down the NPAs of men and women with effect from January 1, 1996.

The Court of Appeal rejected the counter-arguments, including that Section 62 required further action to be taken by trustees before schemes were amended and that to allow this reading of Section 62 would circumvent the principles of EU law which are designed to protect members' benefits. The Court of Appeal held that the effect of Section 62 was in fact to level up members' benefits. Once this has happened, it is possible for the Scheme to move to Period 3, in which benefits can be levelled down. The Court of Appeal therefore held that the *Barber* window was closed with effect from January 1, 1996.

Comment

This is the first time a UK court has held that Section 62 was effective in closing a scheme's *Barber* window and would mean that any schemes in a similar position to the Scheme could argue that their *Barber* windows were also closed with effect from January 1, 1996.

However, the number of schemes affected by this judgment are likely to be small, particularly as it is likely that any such retrospective amendments would have to have been made prior to April 6, 1997, when section 67 of the Pensions Act 1995 came into force.

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- Transport
- Technology and innovation
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- Hong Kong
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- Perth
- Shanghai
- Singapore
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- Cape Town
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- Durban
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