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Essential pensions news

Briefing

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Introduction

Essential Pensions News covers the latest pensions developments each month.

TPR finalises its "professional trustee" description and monetary penalties policy

Of general interest is the publication by the Pensions Regulator (TPR) on August 10, 2017, of two policy documents which provide guidance on the way in which TPR will determine financial penalties for breaches of the governance requirements, and set out a revised description of what it considers to be a "professional trustee".

To resolve areas of doubt raised by respondents during the consultation earlier this year, TPR has revised the description of "professional trustee" since the draft published for consultation in March 2017 as part of its 21st century trustee initiative. The test under the final policy is now based on whether a person is acting "as a trustee of the scheme in the course of the business of being a trustee".

Professional trustee description policy

The Professional Trustee Description Policy sets out how TPR will determine whether a trustee is a "professional trustee", and includes illustrative examples of its approach. The definition is important since TPR expects higher standards from professional trustees and will normally impose higher penalties in the event of a breach.

The key points to note include

Professional trustee description
TPR has redrafted the professional trustee description to resolve areas of doubt raised by consultation respondents. The draft policy described a professional trustee as a person who either acts as a trustee in the course of the business of being a trustee, or is an expert, or holds themselves out as an expert, in trustee matters generally. The test under the final policy is now based solely on whether a person is acting "as a trustee of the scheme in the course of the business of being a trustee".

"Expertise" in trustee matters
An individual representing or promoting themselves as having expertise in trustee matters generally (rather than just in certain areas) will normally be considered to be acting "in the course of the business of being a trustee". The emphasis in the final policy is on whether an individual represents or promotes themselves as having "expertise" in trustee matters generally, rather than being or representing themselves as "an expert" and the illustrative examples provide further information on this distinction. TPR notes that the description of "professional trustee" is not intended to capture experienced lay trustees.

Remuneration not determinative
Remuneration alone is not necessarily determinative of whether someone is acting in the capacity of a professional trustee. TPR distinguishes between remunerated trustees appointed to multiple schemes on the basis of specific expertise (who would be considered a professional trustee) and those with specific expertise, portfolio careers and former executives appointed as a remunerated trustee and who have never held any trustee appointments (who would not normally be considered a professional trustee).

Scheme return
Trustees are asked to indicate on the scheme return whether they are a "professional trustee". TPR will update the scheme return guidance to reflect the revised description. However, the classification in the scheme return is not determinative, and TPR may consider that regardless of what is said in the scheme return, a trustee is a professional trustee.

Illustrative examples
TPR has added a number of illustrative examples to show when it will and will not consider someone to be a professional trustee. In particular, TPR explains that it would not normally penalise professional trustees who take on poorly performing schemes, provided they identify and swiftly report breaches, engage and co-operate with TPR, remedy any breaches and put controls in place to prevent future breaches. This addresses a concern raised by some respondents about the possibility that higher penalties for professional trustees could deter appointments.

TPR notes that the revised professional trustee description will assist the Professional Trustee Standards Working Group (PTSWG), which is developing higher standards for those considered to be professional trustees. The PTSWG (formed in May 2017) is chaired by the Association of Professional Pension Trustees, and its members represent the Association of Corporate Trustees, the Pensions and Lifetime Savings Association, the Pensions Management Institute and TPR.

Monetary penalties policy

The Monetary Penalties Policy sets out how TPR will use powers to impose monetary penalties under pensions legislation (including under section 10 of the Pensions Act 1995 and regulation 28 of the Occupational Pension Schemes (Charges and Governance) Regulations 2015). It does not cover penalties for breaches of the auto-enrolment requirements.

Breaches are categorised into one of three bands. TPR provides some examples of breaches that might fall within a particular band, but states that the particular circumstances of the breach will be taken into account when determining the appropriate band level. This could mean that a breach of the same requirement falls under different band levels, and TPR does not intend to publish an exhaustive list of penalties and the band level they fall in.

The band levels are

Band 1 (least severe)
Penalty range £0 - £1,000 for an individual; £0 - £10,000 in any other case.

Band 2
Penalty range £0 - £2,500 for an individual; £0 - £25,000 in any other case.

Band 3 (most severe)
Penalty range £0 - £5,000 for an individual, £0 - £50,000 in any other case.

The starting point will be the middle of the relevant band if appropriate, but TPR may adjust the starting point taking into account relevant factors. This amount will then be adjusted further to take account of aggravating or mitigating factors (for instance, whether the person is a professional trustee or whether they are a non-professional trustee who is remunerated). TPR emphasises that it has discretion to depart from the band range and impose a higher penalty (up to the statutory limits) if there are aggravating factors.

The policy also sets out how TPR will determine penalties for chair's statement and scheme return breaches.

View the Professional trustee description policy (8 pages).

View the Monetary penalties policy (17 pages).

Employment tribunals – calculation of pension loss

Of general interest is the response to the 2016 consultation on how employment tribunals should assess pension loss as part of an individual's claim. The consultation proposed that in most cases, whether claimants were members of a defined contribution or a defined benefit scheme, loss would be the employer's contributions over the period of loss. Complex cases should be identified at an early stage and dealt with at a separate remedies hearing. In most of these cases loss would be assessed by reference to the Odgen tables but some might require actuarial evidence.

A response to the consultation has now been published, together with

- Presidential Guidance "Employment tribunals: Principles for Compensating Pension Loss" (the Guidance (3 pages)).

- Employment tribunals: Principles for Compensating Pension Loss, fourth edition (the Principles (153 pages)).

These take effect from *August 10, 2017*. See below also for the Supreme Court's ruling on the unlawful level of Employment Tribunal fees, and the inclusion of employer pension contributions in the amount constituting a "week's pay" for compensation purposes.

HMRC newsletter 89: £26 million tax repaid after flexible access in second quarter of 2017

On *July 27, 2017*, HM Revenue and Customs (HMRC) published edition 89 of its regular pension schemes newsletter. As well as confirming several issues of relevance for administrators, the key points of interest to pensions law practitioners are summarised below.

Refunds of overpaid tax
In the period from April 1, 2017, to June 30, 2017, HMRC repaid £26,835,357 in tax repayment claims in respect of members who had flexibly accessed their DC funds. This equates to an average of over £2,500 per claim form submitted. This announcement follows confirmation from HMRC, in a report released earlier this week, that a total of £1.8 billion had been accessed in the same period. These figures have attracted much industry comment, including from former pensions minister, and director of policy at Royal London, Steve Webb, who stated:
"It is outrageous that in just three months HMRC has over-taxed people by more than £26m. It cannot be acceptable to take thousands of pounds per person in excess taxes and then expect people to have to claim that money back. The rules need to be changed so that only basic rate tax is deducted and any extra tax due is collected through the normal tax return process. This would be a far fairer system."

New "Pensions Online" service
From **April 2018**, HMRC will move pension scheme registration and administration to a new digital platform, holding all information relating to scheme administration in one place. This will take place in two phases, in April 2018 and April 2019.

Transfers to QROPS
In the 2016/17 tax year there were 9,700 transfers to QROPS, down from 13,700 in 2015/16. This downward trend follows the Government's decision, announced at the 2017 Spring Budget, to impose an overseas transfer charge of 25 per cent on most transfers from a registered pension scheme to a QROPS.

View the newsletter.

HMRC publishes issues 25 and 26 of its Countdown Bulletin

The Countdown Bulletins published by HMRC are of relevance to previously contracted-out schemes. They provide information of interest to scheme administrators.

Bulletin no. 25 was published on *July 24, 2017*, and is available here.

Bulletin no. 26 was published on *August 10, 2017*, and is available here.

Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2017 – DWP publishes guidance for schemes implementing cap on early exit charges

The cap on excessive exit charges in respect of occupational pension scheme members who intend to make use of the DC flexibilities, will come into effect on *October 1, 2017*, under the Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2017.

The regulations were laid before Parliament on 20 July 2017 and on 21 July the DWP published guidance, *"Implementing a cap on early exit charges for members of occupational pension schemes"* confirms

- Market value adjustments (MVAs) do not fall within the definition of "early exit charge" so trustees and service providers are still able to apply them. Any MVA should be applied before calculating the value of a member's pot to assess whether any charge would come within the one per cent cap.

- Terminal bonuses are not charges and therefore they do not form part of the cap assessment. However, where a member has a "reasonable expectation" that they will receive a terminal bonus, it should form part of the value of a member's pot, and should be added before the assessment is carried out.

- Any other exit charges derived from occupational pension scheme investments in "with profit funds" will still fall within the one per cent cap on early exit charges regime.

View the guidance.

Major reform in data protection legislation – the General Data Protection Regulation

The General Data Protection Regulation (GDPR) is an EU regulation which will take effect on *May 25, 2018*. This major reform will affect all organisations that hold personal data, including pension schemes. Although the UK intends to leave the EU, the provisions of the GDPR will be implemented by way of a new Data Protection Act to ensure legal continuity post-Brexit.

The GDPR builds on the principles already set out in the Data Protection Act 1998 as well as creating additional obligations regarding the treatment of the data schemes hold on their members.

The Pensions and Lifetime Savings Association has produced a useful list of top ten actions for schemes which is available here.

Trustees of pension schemes seeking bespoke training on the GDPR, and the actions which may be required to ensure the correct IT development and training processes are in place ahead of the *May 2018* implementation date, should contact their usual Norton Rose Fulbright adviser for details.

BM UK Holdings Ltd and IBM UK Ltd v Dalgleish and others [2017] – Court of Appeal rules members' "reasonable expectations" are insufficient to unwind scheme changes

Summary

The High Court (HC) decision in the remedies hearing in relation to the IBM Project Waltz case (the remedies judgment) was published on February 20, 2015, with Warren J deciding in favour of the scheme members.

IBM appealed both the remedies judgment and the 2014 HC judgment in *IBM UK Holdings Ltd and another v Dalgleish and others* (the liability judgment).

In a judgment handed down on *August 3, 2017*, the Court of Appeal (CA) dismissed the HC's decision that IBM had not acted in good faith towards members when implementing the changes to its defined benefits (DB) scheme under Project Waltz. Neither did the CA find that IBM had breached its contractual duty of trust and confidence in making the scheme changes.

Disagreeing with many of Warren J's conclusions, the CA nonetheless recognised that he had undertaken *"a massive and unenviable task...in coping with the huge amount of ... documentation ... and evidence" and that "... his discussion of the nature and scope of the Imperial duty ... [would] provide a valuable contribution to the development of the law in this respect"*.

What were the decisions reached in the remedies judgment?

In the remedies judgment, Warren J considered each element of Project Waltz in the context of both the Imperial duty of good faith and the implied contractual duty of trust and confidence. The conclusions he reached (in a bumper 187 page judgment) are summarised below

Non-pensionability agreements (NPAs) – the NPAs were signed by members and purported to make future salary increases non-pensionable. The HC held that the NPAs were unenforceable as they had been obtained in breach of contract. Members who had signed the NPAs were entitled to keep their salary increases and to have them treated as pensionable. In principle, these members could claim damages but this would be of little relevance to them, since their salary increases would now be considered pensionable and the majority of them would thus suffer no financial loss. Those members who did not sign the NPAs, and therefore did not receive any salary increases, could not now claim the salary increases that were awarded to members who did sign the NPAs. Instead, such members would be entitled to damages to reflect

- the salary increases they would have received, had IBM not implemented Project Waltz
- the loss of pension and other rights as a result of not having had such salary increases

Closure to future accrual – the exclusion notices, which sought to exclude active members from the IBM schemes with effect from April 1, 2011, were held to be voidable and capable of being set aside by members. The HC rejected IBM's argument that the notices should be assumed to take effect at some point in the future, when reasonable expectations had lapsed. Warren J held that, in order to terminate members' pensionable service, IBM would need to issue new exclusion notices, which would have prospective effect only. In addition, injunctive relief would be granted to members if IBM issued such notices without conducting a further 60 day statutory consultation. Again, members would be entitled to damages.

Early retirement policy – IBM had introduced a new, more stringent early retirement policy effective from April 6, 2010, which was designed to be cost neutral to the IBM schemes. Any retirement requests on terms that were more favourable than cost neutral would be considered "only in exceptional circumstances". Warren J held that any member who, as a result of the new policy, had retired earlier than he otherwise would have, was entitled in principle to damages. IBM could not rely on the new policy in relation to members who would have enjoyed greater benefits under the old policy.

Contractual duty of trust and confidence – members were found to be entitled to damages in respect of IBM's breach of the implied contractual duty of trust and confidence which arose as a result of the way in which the consultation was conducted. However, Warren J concluded that it was doubtful this would give rise to any additional claim exceeding the other claims summarised above, as there was no additional loss.

The CA judgment

There were 40 issues presented to the CA, though four of these were not pursued. The live issues are set out in an Appendix to the CA's judgment and the principal points are summarised below.

Reasonable expectations

The CA noted that Warren J had reached his decision on the basis that members' reasonable expectations (that the pension scheme benefit structure would not change in future) must be satisfied unless there was no other course of action open to the employer. The CA decided that the HC was wrong to conclude that IBM did not have a free hand to act as they chose in re-shaping the benefits under the scheme because of the members' reasonable expectations. In the CA's view, Warren J was wrong to conclude that IBM could have developed proposals to deliver its business objectives in other ways. The HC was wrong to decide that the members' reasonable expectations prevented IBM

- Making salary increases on the basis they would be non-pensionable
- Closing the scheme to future accrual
- Changing the early retirement policy.

Instead, the HC should have applied a rationality test, as formulated in Wednesbury, that relevant matters (and no irrelevant matters) should be taken into account and the resultant decision must not be one which no reasonable decision-maker could have reached. Warren J had failed to consider whether the members' reasonable expectations had been overtaken by the changes in financial and economic circumstances resulting from the banking crisis of autumn 2008, which IBM could rationally have taken into account in making the benefit changes. Previous statements to members made by the employer regarding the stability and sustainability of scheme benefits for the "long term" did not in themselves give rise to reasonable expectations that DB accrual (and other pension benefit policies) would continue for the foreseeable future.

The Imperial and contractual duties

In considering the NPAs, the CA found that the HC had been wrong to conclude that the members' agreement had been obtained in breach of the employer's implied contractual duty of good faith. In the CA's view, members had not signed them because of a "threat" that salary increases would be awarded on a non-pensionable basis only, and it was not a breach of IBM's contractual duty for future increases to be non-pensionable. The CA found that the IBM case was not substantially distinguishable from Warren J's own decision in *Bradbury v BBC* [2015], where he had rejected the member's argument that a cap on pensionable pay involved improper coercion (and the *BBC* decision has recently been upheld on appeal). The overall attack on Project Waltz had failed as the CA did not agree with Warren J's finding that the members' reasonable expectations prevented the benefit changes. It followed that the members' separate attacks focussing on contractual duty could not then succeed.

The HC had also been wrong to hold that IBM had breached its *Imperial* duty of acting in good faith in giving members only a limited time in which to take advantage of the former, more favourable, early retirement policy. In addition, on the question of whether the defective consultation process (which had not complied with statutory requirements) meant that Project Waltz should not be implemented at all, the CA held that IBM should not be required to unravel and cancel the benefit changes.

The CA held that Project Waltz had been a proper and relevant exercise of the employer's powers, although defects in the consultation process had resulted in breaches of both contractual and statutory duties by IBM. However, a new, compliant consultation would necessarily need to be about different proposed benefit changes which were appropriate for 2017. It was now impossible for members to be put back into the position they ought to have been in, had a proper consultation on the Project Waltz changes been undertaken in 2009. The CA refused to grant an injunction preventing IBM from going ahead with the implementation of the Project Waltz changes without a further consultation process, on the basis that the changes themselves were not unlawful. If the CA were to disallow the Project Waltz changes, IBM would have to consider and formulate entirely new proposals a long time after the relevant events. Even though IBM had breached its statutory duty in not complying with the consultation requirements, it would not be right to require the whole process to be undertaken again as the sanction for the past breach.

Damages

Having decided that the changes could go ahead, the CA acknowledged that the members' damages for IBM's breach of duty in respect of the conduct of the consultation would be difficult to assess. The members claimed that if IBM had given them accurate information in the consultation process, they would then have pursued an agreement for improved future pension provision. The CA noted that members would need to convince the Court, on the balance of probabilities, the extent to which they would have been better off if IBM had conducted a proper consultation.

Comment

It is difficult to imagine a more favourable outcome for IBM. The CA's judgment is the end of the litigation road in this case, as the members have decided there is "little merit" in seeking an appeal to the Supreme Court.

Despite IBM's success, the lengthy and costly litigation is a clear warning that employers must take their *Imperial* duty to act in good faith seriously. Communicating with members in an honest and open way when scheme changes are proposed offers a less troublesome route in effecting benefit changes. It is clearly preferable to ensure that any such exercises are conducted so that members do not feel the contractual duty of trust and confidence between the employer and its employees is adversely affected. The manner in which IBM carried out the consultation, and the heavy-handed way members were notified of future pay rises being on non-pensionable terms, was a breach of the statutory duty. However, the time lapse between the implementation of Project Waltz and the 2017 CA judgment, and the change in economic circumstances over that period worked in IBM's favour. This resulted in the CA's refusal to require the whole process to be revisited in order to punish IBM for the past breach.

In the time between the HC and CA judgments, reasonable expectations were considered in *Thomson* in July 2014. Here, the Deputy Pensions Ombudsman (DPO) held that alleged statements by an employer in 2002 that it intended to continue granting discretionary annual increases to pensions in payment *did not* by themselves create a "reasonable expectation" among affected members in relation to the employer's duty of good faith. The DPO's decision was not binding, but the CA judgment in IBM has now confirmed that it was correct. The DPO also held that the employer had not breached its *Imperial* duty of good faith, as the decision to end increases in 2010 was not irrational or perverse but, instead, was based on valid financial grounds as its schemes had significant funding deficits. The CA has now stated that the two-limbed *Wednesbury* rationality-based test should be applied.

While the CA's decision will be welcomed by scheme sponsors considering benefit changes as a means of addressing funding deficits, it remains the case that employers must consider consultations on pension scheme changes carefully. It is also essential that they allow themselves sufficient time to provide to members accurate and thorough advance communications of any intended changes so as not to fall foul of the statutory consultation requirements. It will be a huge relief to employers that members communications are not automatically legally binding and that members cannot use what the High Court termed "reasonable expectations" in benefit provision to unwind scheme changes.

View the judgment.

Bradbury v BBC – Court of Appeal rules employer entitled to determine whether or not a pay rise is pensionable

The CA has unanimously rejected an appeal by Mr Bradbury, a member of the BBC Pension Scheme, against the imposition by the employer of a cap on pensionable pay. The CA held that on a proper construction of the scheme's rules, the BBC could determine whether or not an increase in pay counted as Basic Salary (and was therefore pensionable), overruling the High Court on this point.

This has been a long-running dispute, on which we reported in detail in our May 2015 update. The case has been considered on two occasions by both the Pensions Ombudsman and the HC. Mr Bradbury had appealed against the HC's 2015 decision that the conduct of the BBC when it imposed the cap on increases to pensionable salary did not give rise to a breach of its implied duties. On this point, the CA found that the HC's analysis of the relevant facts and its conclusion that there was no breach of the duty of trust and confidence could not be faulted.

The CA also held that section 91 of the Pensions Act 1995 had no application to Mr Bradbury's agreement to the cap on pensionable pay, since he was not being invited to surrender an entitlement to a pension or right to a future pension. Section 91 protects the actual, accrued rights of employees. It applies where a person has a right to a future pension, not where a person may acquire a future right to a pension.

Comment

The decision in this long-running litigation will be welcomed by employers. The *Bradbury* decision, along with that in the *IBM* case (see above) confirms that changes to a defined benefits scheme may legitimately be made without breaching implied contractual duties to employees, so long as the employer carries out such changes in a manner which could not be considered irrational or perverse.

Despite the CA's conclusions in both *IBM* and *Bradbury*, employers should bear in mind that given the technical nature of many pensions issues, it will obviously remain important to ensure that information sufficient to explain the effect of any proposed changes is provided to their employees.

R (on the application of Unison) v Lord Chancellor [2017] – Supreme Court rules employment tribunal and EAT fee levels unlawful

In judicial review proceedings brought by Unison, which will be of interest to all employers, the Supreme Court has declared unanimously that employment tribunal (ET) and Employment Appeal Tribunal (EAT) fees at their current levels are unlawful, under both domestic and EU Law, and has quashed the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, on the basis that it prevents access to justice.

In R *(on the application of Unison) v Lord Chancellor* [2017], the Court also found that the Fees Order was indirectly discriminatory under section 19 of the Equality Act 2010. The effect of this decision is that all fees paid since July 29, 2013 must be reimbursed by the Government, and fees at former levels are no longer payable for future claims.

The Court accepted that the objectives behind the Fees Order (transferring the cost burden to users of the tribunal system, incentivising earlier settlements and discouraging weak or vexatious claims) were legitimate. However, the Lord Chancellor could not impose whatever fees he chose in order to achieve these purposes, and the fall in the number of ET claims since 2013 was so sharp, so substantial and so sustained as to warrant the conclusion that the fees were unaffordable.

The Government has accepted the court's ruling, and is putting in place systems for reimbursing all fees paid since *July 29, 2013*.

EAT rules employer pension contributions count towards a week's pay under the Employment Rights Act 1996

In *University of Sunderland v Drossou*, the Employment Appeal Tribunal (EAT) has upheld an employment tribunal's decision that the calculation of a week's pay under the Employment Rights Act 1996 should include employer pension contributions. This departs from long-established practice and increases the value of a week's pay.

The reported case concerned the calculation of the statutory cap for the unfair dismissal compensatory award. The EAT's decision increases the potential value of the cap (subject to the current overall cap of £80,541). However, it will also apply to the calculation of remedies such as statutory compensation for failure to inform or consult.

Advisers to both employees and employers should adjust their calculations of the potential value of unfair dismissal and failure to inform or consult claims accordingly.

Comment

This case alters established practice and increases the potential value of a week's pay. For some employers, this decision could have a real impact and, by extension, it could represent a real gain for some employees. It will be of greatest significance for those payments or remedies where the value of a week's pay is not capped.

The increase to the value of a week's pay will be particularly pronounced for employers who participate in DB pension schemes with a high employer contribution rate. In this case, for example, if Ms Drossou was a member of the DB section of the Universities Superannuation Scheme, the employer contribution is currently 18 per cent of total salary. An ONS survey in 2015 found that for DB schemes, the average total contribution rate was 21.2 per cent of pensionable earnings.

The EAT judgment does not confirm whether Ms Drossou was in a DB scheme and so it is unclear whether the EAT was aware of just how significant an increase to the value of a week's pay its decision could be.

It will be interesting to see whether there is further litigation challenging the correctness of the EAT's judgment, particularly in relation to employer contributions in DB schemes. In the meantime, advisers to both employees and employers should adjust accordingly their calculations of the potential value of unfair dismissal and failure to inform or consult claims.

Pensions Ombudsman: Mrs N (PO-11948) – provider to pay unauthorised member payment charges after insufficient due diligence into QROPS status

The Pensions Ombudsman (PO) has held that an unauthorised member transfer charge could have been avoided if the scheme provider had carried out sufficient checks before authorising a transfer.

The PO upheld a member's complaint where the provider had authorised a transfer of funds into a scheme which had lost its authorised status as a Qualifying Recognised Overseas Pension Scheme (QROPS). Although the provider had carried out certain checks before accepting the transfer instruction (including receipt of a past HMRC letter confirming QROPS status and checking the supplied scheme number against the QROPS list), the PO found it could have been more thorough in its approach. The scheme name was not on the list, though schemes with similar names were. Had the provider acted with proper due diligence, for example by investigating why the specific scheme had not appeared, it would have recognised that the overseas scheme was no longer a QROPS and would not have allowed the transfer under its own internal policy. Therefore, the unauthorised member payment tax charges would not have arisen but for the scheme's provider's lack of sufficient due diligence.

The PO directed the scheme provider to refund to the member the amount of the unauthorised member payment tax charge and surcharge, minus the notional tax liability that the member would have had to pay if the transfer had been a legitimate one. In addition, the member was awarded £1,000 for the significant distress and inconvenience caused.

Comment

Providers need to take great care to carry out appropriate due diligence when dealing with transfer requests involving QROPS, including a thorough check that the past status of the QROPS in question has not changed by the time the transfer is requested. It is also important to scrutinise the name of the scheme, which may have a name very similar to that of a liberation scheme.

Pensions Ombudsman: Halcrow – early retirement terms – member not contractually entitled to historical uplift on transferred-in pension where trustees reduced indexation levels

The PO has given his determination in a complaint by Mr Y against the trustees of the Halcrow Pension Scheme, the Halcrow Group Ltd and CH2M Hill Europe Limited.

The PO held that a scheme member was not contractually entitled to a higher level of increase to his deferred pension following a restructuring of his pension scheme as part of a regulated apportionment arrangement (RAA).

The PO held that, while the member had received documentation both at the point of transfer, and in subsequent trustee communications, confirming that his deferred pension would be subject to a 6.5 per cent annual increase between 2002 and 2012, this amounted to confirmation of his benefits at that time and did not constitute a contractual agreement. The member was entitled to a 6.5 per cent revaluation until the time that the scheme had been restructured as part of an RAA in 2016 to avoid it entering the PPF. In accepting the scheme changes in 2016 the member had accepted a lower level of revaluation on his transferred-in benefits.

The PO held that in absence of a contractual agreement the member was not entitled to the continuation of the original 6.5 per cent revaluation on his transfers in. The decision-maker had not acted incorrectly and the complaint was not upheld.

Comment

As the PO expressed in his determination, the effect of the failure of HGL and the restructuring had a significant effect on Mr Y's pension benefits. However, it is not difficult to see that this was ultimately a consequence of the financial circumstances of the Scheme. It would have been controversial if a successful argument had been made to preserve a member's elevated level of pension increase at a time when many members were likely to have been grateful to see the Scheme stay out of the PPF.

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