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Essential pensions news

Updater

December 2016

Summary

Essential pensions news covers the latest pensions developments each month

DWP publishes consultation on proposed methodology for GMP equalisation, legislation subject to review and draft amending regulations

On **November 28, 2016**, the Department for Work and Pensions (DWP) published a consultation paper which seeks views on

- A proposal for a new methodology for equalising pensions for the effect of guaranteed minimum pensions (GMPs)
- The draft Occupational Pension Schemes and Social Security (Schemes that were Contracted-out and Graduated Retirement Benefits) (Miscellaneous Amendments) Regulations 2017 (the 2017 Regulations)
- A review of existing areas of contracting-out law.

There are four annexes to the paper

- Annex A is part of the main paper and sets out all the consultation questions
- Annex B contains the Government Actuary's Department's report on a fixed revaluation rate for GMPs
- Annex C contains the draft 2017 Regulations
- Annex D contains for comment the ten-stage possible process for resolving the GMP inequalities issue.

The consultation period closes on **January 15, 2017** and the aim is to bring the 2017 Regulations into force on **April 6, 2017**. This is therefore a short consultation period, given the intervening Christmas break.

This is long-awaited guidance to schemes from the DWP on one possible method of equalising GMPs. The suggested methodology, produced in consultation with an industry working group, compares the value of the future expected benefits for the member in the period that needs to be adjusted for GMP inequalities with that for the opposite sex comparator. If the comparator has the greater discounted value of expected cash flow, then that amount is converted into an ordinary scheme benefit. This is a simpler, and more cost-effective, method than previously suggested by the DWP.

The DWP states that the suggested method is optional, and that it does not "comprise legal advice to schemes on how to equalise". The method "simply describes one way of equalising for the effect of the GMP legislation which the Government believes meets the equalisation obligation derived from EU law".

In addition, the DWP confirms that while it is aware of existing practical problems with current contracting-out legislation, including bulk transfers without consent to schemes that have never been contracted out, no new legislation will be forthcoming until autumn 2017.

The draft 2017 Regulations

Chapter 1 of the consultation paper provides commentary on the draft 2017 Regulations which are available at Annex C.

The areas covered are

- The minor amendments made to legislation relating to the revaluation of GMPs when a member's rights are transferred to another scheme
- Amendments to social security legislation which will not appear until the final version of the 2017 Regulations is available, as a separate scrutiny process applies
- Adjustments to notification and payments periods where a contributions equivalent payment is made to enable a contracted-out member to be "bought" back into the State system
- Amendments to strengthen protections so that accrued rights in formerly contracted-out schemes are not adversely affected when amendments are made
- Consequential changes required by the replacement of State Bereavement Allowance by the Bereavement Support Allowance, without which it may be unclear whether there was a requirement to pay an inheritable GMP
- A proposed new GMP revaluation rate for early leavers.

A review of two areas of existing contracting-out legislation

Two sets of regulations relating to contracting-out have been reviewed and amendments are considered.

Bulk transfer issue – the first of these is the Occupational and Stakeholder Pension Schemes (Miscellaneous Amendments) Regulations (the 2013 Regulations), in relation to a problem with bulk transfers without member consent to schemes that have never been contracted-out. Before the abolition of contracting-out, schemes could work around this issue by the receiving scheme becoming contracted-out for a short while so that it could satisfy the legislation by becoming a "formerly contracted-out scheme". Requests have been made of the DWP for further amendments to enable this type of transfer to take place. The DWP says it is "working with stakeholders on this issue" but any relevant changes will **not be introduced before Autumn 2017**.

The second area of review relates to the "tidying-up" secondary legislation introduced in 2012 following the abolition of DC contracting-outs and the transitional provisions for payment of National Insurance rebates to affected schemes.

Comment

The consultation is long, detailed and seeks comments on some issues that have posed difficulties in the pensions industry for a considerable time – decades in some cases. It is regretful that the consultation period is short and also interrupted by the Christmas break.

Schemes will need to consult with their advisers to consider the possible benefits of using the GMP conversion calculations to remove GMP inequalities, and if they spot issues which may adversely affect their scheme, consider responding to the consultation before **January 15, 2017**, in the hopes that they can influence the new methodology.

Although the Government is not compelling schemes to use this method of conversion, the consultation paper states that "the Government believes [that it] meets the equalisation obligation" under EU law. It seems that, despite the UK's referendum vote to leave the EU, the necessity to get to grips with a GMP equalisation process may not be avoided indefinitely.

The new proposed methodology is an improvement on the previous one involving dual calculations for every year, but it is still fairly labour intensive. Further work may be required by both the DWP and the industry working group to deliver a more streamlined offering.

As regards the review of issues within the existing contracting-out legislation, it is disappointing that the relatively simple bulk transfer problem will not be resolved before Autumn 2017.

DWP publishes consultation on protecting savers from pension scams

The Government is committed to protecting people from pension scams; and pursuing those who perpetuate pension scams wherever possible.

A recent DWP consultation sets out a package of measures aimed at tackling three different areas of pensions scams

- A cold calling ban will cut off a key source of pension scams whilst also sending a clear message to consumers that they should be wary of discussing their pension arrangements with cold callers
- Current legislation gives pension schemes limited scope to refuse a transfer, even where there are genuine concerns that the receiving scheme may not be legitimate. The DWP is consulting on clarifying the law so that firms can block pension transfers based on clear objective criteria
- Single-member occupational pension schemes currently require no registration with TPR, and can be set up using a dormant company as the sponsoring employer. They are therefore an easy way for fraudsters to register a pension scheme with HMRC. The DWP and HMRC are consulting on making it a requirement that only active companies can register a pension scheme.

View the consultation paper.

The deadline for responses to this consultation is February 13, 2017.

Comment

There has long been a need for further statutory intervention in relation to pension scams, as members who have a statutory right to transfer can insist on the transferring scheme making the transfer even where the trustees have concerns that the receiving scheme is a pension liberation vehicle or scam. Therefore, trustees and managers will welcome any future power to block statutory transfers where there is no “genuine employment link” with the receiving scheme or evidence of “regular earnings” from that employment.

It is not clear when Government intends to implement the relevant measures once the consultation is complete, but there must be a danger that fraudsters could try to take advantage of the time available before any legislative changes are effective.

DWP proposes drop in general levy rate to reduce surplus

The general levy recovers from occupational and personal pension schemes the core funding provided by the DWP to pay for the three public bodies delivering elements of the pensions protection regime, namely, the Pensions Regulator (TPR), the Pensions Advisory Service (TPAS) and the Pensions Ombudsman (TPO).

A consultation paper published by the DWP seeks views on the proposed rates for the financial year 2017/18 onwards. The DWP estimates that it will have a levy surplus of approximately £13 million at the end of 2016/17. The estimated cost of running TPR, TPAS and TPO is expected to be £44 million in 2017/18, with an estimated balance of £43 million generated if the levy remains unchanged. Although expenditure on these bodies is expected to increase, this could take "a considerable time". The DWP is therefore considering whether to alter the levy rates from 2017/18 to take account of the accumulated surplus. The options it proposes are

- No change
- A reduction in levy rates for all schemes to eliminate the surplus
- To reduce levy rates for very large schemes to eliminate the surplus whilst keeping rates frozen for smaller schemes.

The last option is the one favoured by the Government as this would "balance the need to increase fairness and make the operation of very large pension schemes more economic with the need to avoid imposing an additional burden on smaller schemes."

The consultation closes on **January 18, 2017**.

View the consultation paper.

TPR publishes quick guide to integrated risk management

TPR has published a new quick guide to integrated risk management (IRM).
The guide is aimed at trustees of smaller defined benefit (DB) pension schemes.
Andrew Warwick-Thompson, Executive Director of Regulatory Policy at TPR, said: "*IRM is about more than merely understanding risks. It gives trustees a holistic understanding of their scheme's sensitivity to risk and enables them to agree a sustainable plan with the employer to help deliver promised member benefits. It's also a central feature of our annual funding statement and our DB code of practice which sets out what we expect from trustees.*"

The new quick guidance on IRM provides an overview of the main points, and is designed to be used in conjunction with TPR's full IRM guidance.

TPR states that a commitment to IRM can result in the following benefits

- Better decision making resulting from greater trustee and employer understanding of risks
- Better working relationships between trustees and employers because of open and constructive dialogue
- More effective risk assessment, contingency planning and monitoring arrangements resulting from an evidence-based focus on the most important risks
- Greater efficiency due to more effective use of trustee, employer and adviser resources.

In addition, trustees may find it helpful to use the guide and key considerations as a starting point for board discussions or in meetings between trustees and employers.

View the new quick guide.

View the full IRM guidance.

TPR adds record-keeping to scheme return duties

A survey conducted by TPR of more than 530 trust-based occupational schemes has revealed little recent improvement in record-keeping, which TPR regards as essential to deliver value for money and protect member outcomes. TPR has therefore asked trustees to report on record-keeping in their scheme return in order to help improve standards.

TPR Executive Director Andrew Warwick-Thompson said: *"By adding record-keeping measures to the scheme return, we will be able to target our interventions more specifically at those failing in their duties. Good record-keeping is essential to the good running of a scheme. The time to engage is now - if you don't, you run the risk of increased costs, not managing funding or risks properly, and you could even put members' benefits at risk."*

TPR has launched a quick guide to record-keeping and plans to provide further educational products in 2017, including videos and bite-sized learning.

View the quick guide to record-keeping.

HMRC publishes Pension schemes newsletter no. 83

On December 12, 2016, HMRC published the latest edition of its Pension schemes newsletter no. 83.

This issue includes the following

- A summary of the pensions related announcements in the Chancellor's Autumn Statement 2016 (see our November 2016 update for a full summary of the pension-related contents of the Autumn Statement)
- Information relating to how scheme members can amend information previously provided to HMRC in order to claim one of the protections lifetime allowance (LTA) purposes, together with the information required by HMRC if LTA protection is lost
- A reminder for schemes of the information HMRC requires where a report is made about unauthorised borrowing
- An apology about the delay until 2017 to the online reporting facility for serious ill-health lump sums
- Reminder to those schemes which have not yet submitted their annual returns relating to relief at source, as these are now overdue.

View the Newsletter.

HMRC publishes Countdown Bulletin 21

On 6 December 2016, HMRC published the latest addition of its Countdown Bulletin for schemes which were formerly contracted-out on a final salary basis.

The Bulletin reminds administrators of such schemes which still have open periods of contracted-out employment that the scan procedure reconciling active members' records will automatically close during December 2016.

Where schemes still require closure data, a closure scan request should be completed and sent to HMRC without delay.

View the Countdown Bulletin.

Pension Schemes Bill – update on progress

On **November 28, 2016**, the Pension Schemes Bill 2016/17 was further considered in the House of Lords Committee stage, and an amended version of the Bill was published. The principal issues discussed, in relation to both the Bill and wider pension issues, are outlined below.

Master trust provisions

- **Pause orders** – clarification was provided of TPR's powers to make a "pause order" once a "triggering event" has occurred, currently provided under clause 31 and schedule 1. Broadly, a pause order will allow TPR to prevent new members joining the scheme, benefits being paid or further contributions being received during the applicable period. Amendments to the pause order provisions included

- **Alignment with TPR's powers to make freezing orders under the Pensions Act 2004** – amendments were made to clarify that the power could be used to prevent benefits being paid out, to a missing definition of "pension credit", and to make consequential amendments to ensure that members retained their entitlement to benefit payments affected by the pause order. In addition, the pause order may be extended until the end of a triggering event period, after an amendment removed a six-month extension limit from the Bill.

- **Allowing a pause order to be issued to an existing master trust at any point between the application and decision for authorisation** – this is intended to apply regardless of whether a triggering event has occurred if, among other points, it is necessary in light of an immediate risk to the interests of members. This amendment is aimed at protecting members during the relatively lengthy authorisation process.

- **Procedure for authorisation applications from an existing master trust scheme** – amendments were made to align the process for deciding whether to grant authorisation to an existing master trust with the process available to new schemes.

Among other points, the formal standard or special procedures of TPR will not apply to such applications, but the decision should still be made by TPR's determinations panel and the applicants would retain a right of appeal. Amendments also clarified that an applicant who was refused authorisation would not have to commence the process of transferring members out and winding up until any appeals were concluded.

Cold calling – the Government confirmed that it will start the consultation on banning so-called "cold calling" in relation to pensions (announced in the Autumn Statement) before Christmas.

DB green paper – the Government indicated that concerns about the validity of the current standards for the calculation of DB deficits would be explored further in the forthcoming green paper to be issued "over the winter".

Pensions dashboard – the introduction of the pensions dashboard to deal with small DC pensions and indications that the government was "looking at" potentially simplifying the process for DC bulk transfers (but no firm plans were announced at this stage).

A revised version of the Bill was published and a tracked changes version is available.

The Bill will now move onto the report stage in the House of Lords, scheduled to take place on **December 19, 2016.**

Draft Finance Bill 2017

On **December 5, 2016**, HM Treasury and HMRC published draft legislation and explanatory notes for the Finance Bill 2017. The legislation is open for consultation until **February 1, 2017**.

The key pensions provisions are set out below

- **Employer-arranged pensions advice exemption** – a new income tax exemption is introduced to cover the first £500 worth of pensions advice provided to an employee, former employee or prospective employee in a tax year. For these purposes, “pensions advice” also includes advice on general financial and tax issues relating to pensions. This provision will replace existing provisions which limit the exemption solely to pensions advice and was capped at £150 for each employee in any tax year

- **Foreign pensions** – measures amending the tax treatment of non-UK pensions and lump sums will come into effect on April 6, 2017

- **Eligibility criteria to be amended for foreign schemes to qualify as “overseas pension schemes”** – see below for details of the consultation on the draft amending regulations. The closing date for comments on these draft regulations is **February 1, 2017**

- **Reduction in the money purchase annual allowance (MPAA)** – legislation will be introduced to reduce the MPAA from its current level of £10,000 to £4,000. The MPAA was introduced in April 2015 as part of the pension flexibility reforms and is designed to limit the scope for individuals who are flexibly accessing a defined contribution pension arrangement to obtain further tax relief by making additional pension contributions.

Comment

The purpose of this consultation is to ensure that the legislation works as intended, rather than to consider the underlying policy, so it is likely that any further changes to the draft Bill will be relatively minor. The final contents of the Finance Bill 2017 will be confirmed in the spring 2017 Budget.

HMRC consults on changes to overseas pension scheme conditions

HMRC has published the draft Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) (Amendments) Regulations 2017 (the Amending Regulations), which set out proposed changes to the conditions that an overseas pension scheme has to meet for UK tax relief to apply to contributions or transfers.

The draft regulations set out proposed changes to the conditions to be an ‘overseas pension scheme’ and a ‘recognised overseas pension scheme’, together with a draft explanatory memorandum. The deadline for responses is **February 1, 2017** and the Amending Regulations are due to come into force on **April 6, 2017**.

Transfers of pension savings that have had UK tax relief can be made free of UK tax (up to the lifetime limit on tax-relieved pension savings) to qualifying overseas pension schemes (QOPS) and qualifying recognised overseas pension schemes (QROPS).

The Amending Regulations will make changes to the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006 (the 2006 Regulations), by setting out changes to the conditions that a pension scheme based outside the UK must meet for an individual to get UK tax relief on contributions or transfers to the scheme abroad.

Following the introduction of the pension flexibility regime, changes were made to the 2006 Regulations to align registered pension schemes and overseas schemes more closely and to ensure that overseas pension benefits which had received UK tax relief were payable no earlier than they would have been under a UK registered pension scheme (the normal minimum pension age, currently age 55).

There was also a requirement for overseas schemes to designate 70 per cent of funds that have received UK tax relief to provide the individual with an income for life in order to be a QOPS or a QROPS (the 70 per cent rule).

The Amending Regulations replace 70 per cent rule and requires those who provide non-occupational pension schemes to be regulated in the country where the scheme is established if the scheme itself is not regulated. This ensures that where there is a regulator, then the pension scheme or the provider of the scheme, as the case may be, will be regulated.

The Amending Regulations also amend the pension age test to allow for payments to be made before age 55 where such payments would be authorised if paid by a UK registered pension scheme.

View the draft legislation and explanatory memorandum.

Revaluation order 2016 laid before Parliament

The Occupational Pensions (Revaluation) Order 2016 was laid before Parliament on **November 21, 2016** and comes into force on **January 1, 2017**. The Order confirms the amount by which deferred pensions in occupational pension schemes using the final salary revaluation method should be revalued for those reaching retirement during 2017.

The order specifies the minimum revaluation percentages that must be applied to preserved pensions for members of occupational pension schemes who reach their scheme's normal pension age (NPA) in 2017. The appropriate revaluation percentage for a member depends on the number of complete years between the date the member left pensionable service and the date on which they reach NPA. Different revaluation provisions govern GMPs.

Under the statutory limited price indexation formula, the percentage increase for the most recent calendar year must match the increase in the consumer prices index (CPI) for the 12 months to 30 September, capped at 5 per cent or 2.5 per cent according to whether pensionable service was completed before or after 6 April 2009. CPI inflation was 1 per cent for the 12 months to 30 September 2016, and therefore the higher and lower revaluation percentages for early leavers' pensions have been fixed at 1 per cent for the 2016 calendar year revaluation period. Revaluation percentages for calendar years running back to 1986 are also adjusted by the Order to take the most recent year into account.

Council of the EU adopts IORP II

On **December 8, 2016**, the Council of the European Union formally adopted a directive on institutions for occupational retirement provision (IORPs), aimed at facilitating their development and better protecting pension scheme members and beneficiaries (known as IORP II). The directive revises the IORP Directive (Directive 2003/41/EC) on the activities and supervision of IORPs.

The directive will come into force 20 days after it has been published in the Official Journal. Member states will then have 24 months in which to transpose it into national law. The overlap between the IORP implementation timetable and the EU exit negotiations under Article 50 of the Lisbon Treaty means that the UK may need to implement the IORP II directive despite the vote to leave the EU. It is also possible that the IORP II directive may need to be implemented in any event under any agreement governing the relationship between the UK and the EU going forward.

Parris: ECJ decides no discrimination arises from death-bed marriage restriction in qualifying requirements for survivor's pension

The Court of Justice of the European Union (ECJ) gave judgment on November 24, 2016 in *Parris v Trinity College Dublin and others*. The ECJ went against the Opinion of the Advocate General (AG) which was given in June 2016, and found that Dr Parris, had suffered no discrimination on grounds of age or sexual orientation contrary to the Equal Treatment Framework Directive (the Directive).

Dr Parris had argued that his same-sex partner should be entitled to receive a survivor's pension from his employer's scheme on his death. However, the scheme rules provided that no survivor's pension would be available where a member had married or entered into a civil partnership after reaching the age of 60. Dr Parris had entered into a civil partnership in the UK when aged 63. However, he argued that compliance with the age 60 limit rule was legally impossible for him, given that his civil partnership was not recognised under Irish law until 2011, five years after he had attained the age of 60.

The ECJ found no basis for a discrimination claim based on either sexual orientation or age. The Court noted that the Directive was without prejudice to national laws on marital status and held that EU law did not require Ireland to provide for marriage or civil partnership for same-sex couples, albeit that once such measures were enacted they must comply with the Directive's non-discrimination provisions. Neither was Ireland required to give retrospective effect to its Civil Partnership Act nor implement transitional provisions for those who had already reached the age of 60 when the Act came into force.

The law

The Directive established a general framework for equal treatment and non-discrimination in employment law in the EU.

Article 2 of the Directive prohibits direct and indirect discrimination on the grounds referred to in Article 1 which include sexual orientation and age. However, Article 6(1) allows Member States to provide that differences in treatment on grounds of age will not be discriminatory if, within the context of national law, they are objectively and reasonably justified by a legitimate aim. Such permissible aims include legitimate employment policy, labour market and vocational training objectives, if the means of achieving those aims "appropriate and necessary".

In the context of age discrimination, Article 6(2) permits Member States to allow for the fixing in occupational social security schemes of certain age-related criteria, including in relation to admission to a scheme or entitlement to retirement benefits. The ECJ ruled that Article 6(2) was wide enough to apply to the age 60 limit relating to survivors' pensions in the scheme rules. The ECJ also declined to find any indirect discrimination from the combined effect of discrimination based on sexual orientation and age.

The questions before the ECJ

The Irish court referred the matter to the ECJ for a preliminary ruling on the following questions

- Did the age 60 limit constitute discrimination on grounds of sexual orientation contrary to Article 2 of the Directive in circumstances where the member and his surviving partner were not permitted by national law to enter into a civil partnership until after the member had already attained the age of 60?

If not, did the age 60 limit constitute discrimination on grounds of age contrary to Article 2 where the stipulation as to age was not a criterion used in actuarial calculations?

- If not, did discrimination contrary to Article 2 arise from the combined effect of the age and sexual orientation of the member?

Submissions were provided to the ECJ by the parties and in addition by the European Commission and the UK government.

Advocate General's opinion

The AG proposed that the ECJ should find in the member's favour on the basis that the age 60 limit amounted to indirect discrimination on grounds of sexual orientation. While acknowledging that the rule was intended to target so-called "death-bed marriages", the AG suggested it was an "extremely drastic measure" which was not a necessary means of achieving an objectively justifiable legitimate aim. She also said the rule amounted to direct discrimination on grounds of age and suggested indirect discrimination arose from the combined effect of discrimination based on sexual orientation and age (even if discrimination could not be made out from one of these factors alone).

In addition, the AG rejected the submission made by the defendants, and supported by the UK Government, that the effect of the decision should be restricted to take account of the fact any discrimination arose from periods of service which pre-dated the Directive.

ECJ decision

The ECJ found against Dr Parris on all three points, deciding not to follow the AG's position

- Discrimination on the basis of sexual orientation – the ECJ held that the survivor's pension rule did not constitute direct discrimination, as it was "worded neutrally and moreover refers both to homosexual employees and to heterosexual employees, and excludes their partners, without distinction". It followed that civil partners were not treated less favourably than surviving spouses in respect of the survivor's benefit.

- The Directive was clear that Member States were free to provide or not provide for marriage for persons of the same sex. They could choose the date from which such a marriage or alternative form was to have effect. As a consequence, EU law did not require Ireland to provide for marriage or a form of civil partnership for same-sex couples before January 1, 2011. Nor was it required to give retrospective effect to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, or to or provide transitional measures for same-sex couples.

- The ECJ acknowledged that the scheme rule treated members who marry or enter into a civil partnership after their 60th birthday less favourably than those who marry or enter into a civil partnership before reaching that age. However, the Directive allowed pension schemes to fix an age for entitlement to a "retirement benefit" without this being discrimination. Therefore, the rule did not constitute discrimination on the grounds of age. The fact that it was not legally possible for Dr Parris to enter a civil partnership before he could reach age of 60 (as Ireland had not passed legislation to enable this) did not change this conclusion.

- On the point of combined discrimination, the ECJ again found against Dr Parris. It acknowledged that although it was possible for discrimination to be based on grounds as set out in the Directive, there is, however, no new category of discrimination resulting from the combination of more than one of those grounds … where discrimination on the basis of those grounds taken in isolation has not been established".

Comment

The ECJ's reasoning is less detailed on the particular issues than the AG's opinion and, because the ECJ declined to follow that opinion, there was no discussion of one of the key conclusions she reached in respect of the "temporal restriction". In the AG's analysis of this point, she considered that there was no basis in EU law to justify imposing a temporal limitation on the effect of its judgment, as was applied in Barber. She found that the applicability of the Directive in relation to survivor's pensions was established in *Maruko*, a case where the ECJ refused to impose a temporal limitation on the effect of its judgment.

If the ECJ had followed the AG's opinion, this would have had a likely impact on the impending appeal in the *Walker v Innospec* case with regard to the "no retroactivity" and "future effects" principles under EU law. In *Walker*, the member's pensionable service (which would be used to calculate a survivor's pension) almost entirely pre-dated December 5, 2005, when the Civil Partnership Act 2011 came into force. The Supreme Court appeal in *Walker* was delayed until 2017, pending the outcome in *Parris* but it seems unlikely that Mr walker will succeed in the light of the *Parris* decision.

Mr R (PO-3633): recovery of overpayments – timing of member's expenditure cast doubt on good faith

The Pensions Ombudsman (TPO) has given his determination in a complaint by Mr R against Abbey Life Assurance Company Limited (Abbey Life), and has decided that a member had no good defence to a pension scheme's demand for repayment of tax-free lump sum overpayments given he spent the money partly to pay off debts, partly after he became aware of the mistake and partly on expenses that he might have incurred in any event.

Background

Mr R was a member of the Mayfair Construction Ltd Executive Pension Plan (the Plan) and the Mayfair Construction Ltd Directors and Executives Retirement Plan (the Executive Plan).

Between July 2010 and January 2012, he received benefit statements from the schemes' administrator, Abbey Life, which showed he could take a tax-free lump sum of up to around £20,000 from the Plan and £5,000 from the Executive Plan.

Following an enquiry by Mr R's financial adviser, Ms Evans, as to whether Mr R's salary would enable larger lump sums, Abbey Life issued a revised quotation on August 21, 2012, stating that the whole of the first fund could be taken as a tax-free lump sum of £73,532.58 and the second as a lump sum of up to £13,234.19 with a small yearly pension. Ms Evans did not query the lump sums and recommended to Mr R that he should take them. Mr R did this, receiving a total lump sum of £87,064.68.

On March 11, 2013, Abbey Life informed Mr R that due to "human error" a database had been updated with the wrong figures and the maximum tax-free lump sums in the August 2012 quotation should have been £18,383.15 and £11,606.84. Abbey Life asked Mr R to repay the total overpayment of £56,966.78. Mr R responded on April 1, 2013 that the "money has been spent" and contacted the Pensions Advisory Service (TPAS).
In January 2014, he told TPAS he had used the money to pay off £51,470.47 in credit card debts, as well as to buy a car (£13,750), take two holidays with his wife (£4,600), help with his daughter's removal costs (£750), repair his roof (£2,452) and pay living expenses.

However, on examining Mr R's bank statements, Abbey Life said they showed that a significant of money was still held at the beginning of 2014 and a large number of cash withdrawals had been made later, casting doubt on his claim of April 1, 2013 that the money had already been spent. Abbey Life concluded that Mr R had not been open and transparent in his dealings with it. Nonetheless, Abbey Life offered to offset the overpayment amount by £5,000 as a goodwill gesture.

Mr R complained to TPO that he should not have to repay the overpayment as he had relied on the August 2012 quotation and subsequent payments in spending the money. He also argued that he relied on Ms Evans' advice that he could take the lump sums and said that she had told him the increased amounts were related to his wife's ill health. He was now concerned he might become bankrupt.

Determination

The matter, as usual, was considered first by an ombudsman adjudicator in TPO's office. TPO dismissed the complaint, noting that he agreed with the ombudsman adjudicator's initial opinion, which Mr R did not accept.

The adjudicator's opinion was that, under the general principles of restitution, Mr R must repay the overpayments unless he had a valid defence of change of position. For this defence to apply, Mr R would need to show that he had changed his position, acting in good faith, in reasonable reliance on the incorrect information.

Although Mr R had used most of the money to repay his credit card debts, it was settled case law that repayment of a debt did not count towards a change of position. It was also possible that he would have incurred the expenditure cited in relation to the remainder of the money even if he had not received such a large lump sum. The adjudicator therefore found that he had not changed his position in that regard either.

In addition, on the issue of whether Mr R had acted in good faith, the adjudicator noted that his bank statements, which he did not disclose until 2014, showed that there was still over £43,000 in his account at the time he was informed of the overpayment, although he told Abbey Life all the money had been spent. The adjudicator therefore decided that Mr R had "not shown equitable grounds for him to avoid making repayment".

However, the adjudicator also noted that given Ms Evan's advice and the earlier discussion about whether the lump sums could be increased, it was not unreasonable of Mr R not to have queried the August 2012 quotation at the time.

TPO's findings

In reaching the same conclusion as the adjudicator, TPO considered both the possible change of position and whether Mr R had any claim of negligent misstatement against Abbey Life. A member was only entitled to benefits at set out under the scheme rules, but TPO would provide redress, broadly, if it could be shown that financial loss or non-financial injustice flowed from the incorrect information given. The member must also have relied on the incorrect information to his detriment and it must have been reasonable for him to have done so.

TPO noted that Mr R's bank statements showed that a car purchase was not completed until April 22, 2013, and (TPO held) Mr R incurred the expenditure claimed either after he knew about the error or that it was expenditure that he might have incurred even if the overpayment had not been made. The £5,000 already offered by Abbey Life partially to offset the overpayment was ten times the minimum that TPO currently awarded for non-financial injustice and it was found to be satisfactory compensation in the circumstances for any anguish and pain suffered by Mr R.

Comment

This case sets out clearly the actions that pension scheme trustees or administrators need to take in investigating the circumstances surrounding an overpayment before demanding repayment.

While it is sometimes considered that recipients of overpayments may be better off spending the monies received, rather than saving them, this determination highlights that matters are not always that simple.

The case has confirmed that the repayment of debts (such as credit card bills in this instance) will not amount to a sufficient change of position in law. It is not considered to be a detriment to the member to pay off a debt which would have to be paid off sooner or later. Secondly, since a change of position defence is an equitable remedy, the recipient of an overpayment must be seen to be entirely open in his dealings with the administrator or trustees. Acting otherwise may cast doubt on the issue of the member's good faith.

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