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NORTON ROSE FULBRIGHT

Essential pensions news

Updater

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Introduction

Essential Pensions News covers the latest pensions developments each month in an 'at a glance' format.

Reminder: act now to certify contingent assets for 2016/17 PPF levy purposes

Of interest to all schemes providing DB benefits are the various deadlines, set out in detail below, for submitting data and documents to the Pension Protection Fund (PPF) for calculation of insolvency scores used to calculate the PPF risk-based levy. Documentation relating to the certification of contingent assets much reach the PPF by midnight on *March 31, 2016*.

As preparation of contingent asset documentation can take several weeks, clients who are intending to use contingent assets to reduce their risk-based levy are urged to start the process without delay.

The PPF has now confirmed its rules governing the calculation of levies for the 2016/17 levy year, which starts on *April 1, 2016*. Proposals made by the PPF to simplify and apply a 'lighter touch' to the re-certification procedures for asset-backed contribution (ABC) arrangements and excluded mortgages have been largely welcomed. The PPF's ABCs guidance has been redrafted to include example situations where this approach may be suitable. The guidance also confirms that, on re-certification, trustees may use previously-obtained legal advice as long as the underlying legal position has not changed. In addition, a valuer may use a 'prudent estimation' approach rather than certifying a specific figure.

PPF-eligible schemes should check their insolvency scores and diarise the relevant deadlines for submitting data and documents to the PPF. In particular, they should note the deadline for submitting certain items has been moved from *5pm to midnight on March 31, 2016* to align the position with the equivalent deadline for reporting to TPR.

The key dates for the various major reporting requirements are set out below.

Reporting requirement	Deadline
Monthly Experian Scores to be used in the 2016/17 levy	Between April 30, 2015 and March 31, 2016
Deadline for providing updated information (to Experian) to impact on Monthly Experian Scores	One calendar month before the 'Score Measurement Date'
Submit scheme returns on Exchange	By Midnight on March 31, 2016
Reference period over which funding is smoothed	Five- year period to March 31, 2016
Certification of contingent assets	By Midnight on March 31, 2016
Certification of asset backed contributions	By Midnight on March 31, 2016
Certification of mortgages (emailed to Experian)	By Midnight on March 31, 2016
Certification of deficit-reduction contributions	By 5pm on April 30, 2016
Certification of full block transfers	By 5pm on June 30, 2016
Invoicing starts	Autumn 2016

PPF publishes updated sample contingent asset certificates for 2016/17 levy year

Of interest to DB schemes is the PPF's publication of updated versions of its sample certificates for the six types of contingent asset that levy-paying pension schemes may certify in order to reduce their risk-based levy for the 2016/17 year. A link to each is provided below.

Sample certificates are available for:

- Type A: group company guarantee.
- Type B(i): security over a bank account.
- Type B(ii): security over land in the UK.
- Type B(iii): security over a portfolio of securities.
- Type C(i): letter of credit/bank guarantee: 'evergreen' assets.
- Type C(ii): letter of credit/bank guarantee: guarantees against planned future special contributions to the scheme.

Certificates must be submitted to the PPF by midnight on *March 31, 2016*.

PPF publishes updated Q&A note for trustees' assessment of guarantor strength

DB scheme trustees who are certifying contingent assets for the 2016/17 levy year should consider the updated briefing note issued recently by the PPF. Although substantially unchanged from the version published in January 2015, the note reflects the PPF's experience of the contingent asset review process to date and highlights particular issues of relevance for trustees. The PPF emphasises that the note does not replace the Levy Rules and Guidance for 2016/17, which are available here.

The briefing highlights the following points:

- While the PPF welcomes the use of contingent assets, its experience has been that the recovery from a guarantor has typically proven negligible in relation to the guaranteed sum because the guarantor is also insolvent or otherwise unable to pay the guaranteed sum if the guarantee were called.

- Guarantees can provide significant levy reduction, so the PPF needs to know that the risk reduction offered by the guarantee is commensurate with the levy reduction. Giving too much credit for contingent assets could mean that other levy payers pay more.

- Testing of guarantor strength has shown that a high proportion of Type A contingent assets fall short of the necessary standards and have been rejected, particularly where certifying for a different amount or using a stronger guarantor could have seen the risk reduction recognised.

- Trustees should be aware that, although the PPF does have the power to grant partial recognition to an asset, that is only in exceptional circumstances. *In the great majority of cases, even where the guarantor is considered to be good for a lower sum, the asset is disregarded entirely* (emphasis added).

- For contingent assets being certified in the period up to *March 31, 2016*, including for re-certification of assets recognised in a previous year, trustees need to give the following certification:

  'The trustees, having made reasonable enquiry into the financial position of each certified Guarantor, are reasonably satisfied that each certified Guarantor, as at the date of the certificate, could meet in full the Realisable Recovery certified, having taken account of the likely impact of the immediate insolvency of all of the relevant employers.'

The briefing then sets out particular points for trustees to note, and highlights the importance of going further than simply reviewing each Guarantor's covenant:

- Trustees must certify a figure (the 'Realisable Recovery') that each Guarantor is good for in cash terms. If more than one guarantor is certified, each must be independently able to meet the realisable recovery.

- Trustees must make enquiries into the financial position of the Guarantor – some rejections have occurred where trustees appear to have simply concluded that because the guarantor is large relative to the guarantee this suffices.

- Trustees must consider the impact on the Guarantor's position where the employers have become insolvent. This may have profound impacts on the Guarantor – causing it to cease trading or, at the least, to significantly affect its ability to generate value or access funds. These effects may flow directly or indirectly through impacts on other group companies.

- In considering the ability of the Guarantor to meet the certified sum, trustees should consider a range of factors e.g. the recoverability of sums owed to the Guarantor.

- Trustees should be able to demonstrate that they have challenged assertions made by the Guarantor and where appropriate obtained third party evidence to support their view. The extent to which this is necessary will depend on the criticality of the assertion.

The PPF strongly advises trustees to keep comprehensive records and evidence for their certification assessment so that it can be justified if necessary. Much of this is, in essence, what trustees complying with the spirit of the PPF's Guidance will have been doing in the past.

The note them provides a number of examples of issues which have arisen in relation to the given questions, although the PPF stresses these should not be used as a checklist:

- Is there evidence to demonstrate that the Guarantor has the ability to continue as a going concern after the insolvency of the employer?

- Can the Guarantor still trade after the disposal of assets required to meet the guarantee?

- What is the impact of inter-company balances?

- Are there restrictions on the use of undrawn finance facilities and cash balances post employer insolvency?

- Where EBITDA multiples or similar measures are used in company valuation, how was the multiple chosen and is it reasonable?

- What are the Guarantor's funding & borrowing sources, treasury arrangements if used, security structure, cross guarantee obligations and funding defaults?

- Are asset valuations appraised on a basis appropriate for the circumstances to support the amount attributed to specific assets?

- Where the Guarantor cannot trade without the employer, is an estimated outcome statement needed?

- What value of investments in group subsidiaries and other group assets can be relied on?

- Can the Guarantor control income streams of connected parties required to meet the guarantee obligations?

- Is the view that the Guarantor could meet the guarantee dependent on an assumption about a recovery from the insolvent employer?

View the briefing note.

PPF compensation cap and levy ceiling set for 2016/17

The PPF compensation cap and levy ceiling for the 2016/17 financial year have been fixed by statutory instrument applying from *April 1, 2016*. Details are provided below.

The compensation cap will rise from its current level of £36,401.19, to £37,420.42 as a result of an increase in the general level of earnings in the 2014/2015 tax year. The 90 per cent level that applies for members of schemes entering the PPF who are below their scheme's normal pension age will therefore equal £33,678.38.

The order also confirms that on *April 1, 2016* the overall PPF levy ceiling will rise from £947,610,293 to £981,724,264, reflecting the 3.6 per cent increase in earnings for the period from August 1, 2014 to July 31, 2015.

Pension flexibility: DWP guidance on safeguarded benefits and the advice requirement

Of interest to all schemes offering DB benefits (and potentially to the trustees or administrators of the receiving DC schemes) is the DWP's recently published factsheet to assist pension scheme providers in determining the scope of 'safeguarded benefits' to which the 'advice requirement' applies.

Where a member with DB benefits exceeding £30,000 wishes to transfer to a DC scheme to take advantage of the new pension flexibilities, trustees must check that the member has received independent financial advice. This is known as the advice requirement in respect of 'safeguarded' rights – broadly non-money purchase benefits. The advice requirement does not apply if the value of the member's safeguarded benefits is £30,000 or less.

The DWP notes that uncertainty has arisen, in particular, regarding pension benefits with guarantees and whether they come within the definition of safeguarded benefits. Among other points, the factsheet indicates that to qualify as safeguarded, the benefits must include 'some form of guarantee about the rate of secure pension income to be provided'. Policies with a guaranteed annuity rate (GAR) would normally qualify because a member has a right to convert their pot into income (in accordance with a known conversion factor). Other types of guarantees considered in the factsheet include those relating to GMPs and section 9(2B) rights and 'pension review top-up plans' (which may qualify as safeguarded), and benefits such as guaranteed lump sums and guaranteed investment returns during the accumulation phase (which would not). The DWP highlights that the status of certain types of guarantees are more likely to depend on their specific terms, including retirement annuity contracts, buyout policies and AVCs.

The factsheet also contains an update on the progress of the DWP's call for evidence on the valuation of pensions with a GAR, which ran until January 15, 2016. The DWP reports that the majority of respondents favoured a change to the current valuation method. It is planning to consult on draft regulations to simplify the process, later in 2016.

View the factsheet.

Incentives exercises: revised Code of Practice published

Of interest to all DB schemes considering incentives exercises is the revision of the code of practice originally drawn up in 2012 by the industry-led group the Incentive Exercises Monitoring Board.

The code's seven core principles remain largely unchanged and the amendments are for the most part minor. Primarily, a new 'proportionality threshold' has been introduced, meaning that where an incentive offer relates to DB pension rights worth £10,000 or less, there will be no requirement on the employer or trustees to offer financial advice or guidance before the offer is accepted, although guidance should be offered that is 'readily accessible' to members. The revised code also makes clear that its scope includes 'full commutation exercises', where a cash lump sum is being offered to members to replace a pension.

A set of 'boundary examples' has been published alongside the revised code, illustrating several sets of circumstances where the code may and may not apply. The practitioners' notes published with the original 2012 version have not been withdrawn, but are effectively being discontinued.

The revised code applies to any new incentive offers made to members on or after its publication date (February 1, 2016). Where an offer has already been made in writing, the original version of the code will continue to apply to it.

Comment

The revised code has generally been received, as it is considered important that it should continue to reflect the changing pensions landscape following the introduction of the pension freedoms in 2015. In the light of the new pension flexibilities, many employers have sought to put in place exercises to accelerate the de-risking of their schemes, and the boundary examples have been welcomed as particularly helpful.

View the revised Code.

View a marked-up version showing the changes from the original.

HMRC publishes issue 13 of its Countdown Bulletin

Of interest to contracted-out DB schemes are the contents of HMRC's latest bulletin on the end of DB contracting-out are summarised below.

Issue 13 of the Countdown Bulletin includes:

- a reminder that time is short for schemes to register to use HMRC's Scheme Reconciliation Service. The deadline is *April 5, 2016*
- a summary of the topics discussed at the Pension Forums on ending contracting-out which were held in December 2015, principally in relation to the HMRC contracting-out processes which will, or will not, be maintained after *April 5, 2016*. HMRC confirms:
  - there will be no need for administrators to send termination, transfer or buy-out notifications for events happening post *April 6, 2016*

  - schemes will need to maintain their own records in respect of who their members are and what their GMP liabilities are
  - HMRC will accept termination, transfer and buy-out notifications for events that happened prior to *April 6, 2016* until *December 2018*
- results of a survey of scheme administrators on how they would prefer to receive closure scan details of active members
- a call for schemes interested in participating in HMRC's GMP Service User Research
- an update from the DWP on forthcoming changes in respect of the new State Pension and the tax relief allowances affecting private pension saving.

View the Bulletin.

HMRC publishes Pension Schemes Newsletters no. 75 and 76

Of general interest is HMRC's most recently published Pension Schemes Newsletters, summarised below.

Issue 75 of the Pension Schemes Newsletter includes:

- confirmation that the Finance Bill 2016 will include provisions to cover cases where a scheme member elects to draw down funds from a registered pension scheme, but the drawdown funds are not used up before death, so that the undrawn funds are not subject to an IHT charge
- information on reporting non-taxable payments under the new pension flexibilities on the Real Time Information (RTI) system
- tax codes for scheme administrators operating PAYE in respect of Scottish taxpayers
- information relating to annual returns for registered pension scheme operating a relief at source system
- a reminder that individuals are not able to apply for fixed or individual protection 2016 until after *April 6, 2016*, as certain declarations cannot be provided until after that date. Scheme members intending to apply for either of the 2016 protections are reminded that they will normally need to stop building up benefits under every registered scheme of which they are a member by *April 5, 2016*
- a reminder of the operation of the tapered annual allowance, the alignment of pension input periods and the money purchase annual allowance.

View the Newsletter.

Issue no 76 includes:

- relief at source – a further reminder that schemes operating relief at source that the annual return of information for the tax year 2014/15 was due by *October 5, 2015* and some are still outstanding

- a pro forma letter for individuals intending to apply in due course for IP2016 or FP2016
- notification that HMRC intends to provide new forms for use where beneficiaries wish to reclaim overpaid tax once the tax treatment of certain death benefit payments changes on *April 6, 2016*.

View the newsletter.

Government response to consultation on pension transfers and early exit charges

Of general interest is the publication by HM Treasury on February 10, 2016 of the Government's response to its July 2015 consultation on pension transfers and early exit charges.

The consultation found that, although the majority of eligible individuals are able to access their pension under the new freedoms, there are a small but significant number who have been effectively prevented from doing so because of high exit charges or long transfer times.

The consultation responses also indicated that, for Financial Conduct Authority (FCA)-regulated contract-based pension schemes, transfers took 16 days on average. However, TPR's data showed that the mean transfer time for trust-based pensions was 39 days, with many consumer survey respondents indicating that they had to wait significantly longer for individual transfers.

The Government's response confirms that:

- As announced in January 2016, it will act to limit early exit charges for those seeking to access the pension freedoms by introducing legislation to place a new duty on the FCA to limit early exit charges. On February 9, 2016, Parliament published a document containing proposed amendments to the Bank of England and Financial Services Bill 2015–16 to effect this policy
- It will consider how existing powers to limit pension charges can be used to mirror these new requirements for trust-based pension schemes
- TPR will introduce new guidance for scheme trustees, alongside the revised DC governance code of practice, to ensure transfers are processed quickly and accurately. It will also make trust-based schemes more transparent and accountable for their performance in processing transfers through a new requirement to report how they are performing in processing transfers, including against possible benchmarks and new transfer targets. TPR will work with the pensions industry in order to bring a package of measures into force in Summer 2016
- Pension Wise will develop additional guidance on pension transfers, to support individuals through the transfer process. This will include information on likely timescales, what customers need to do, and greater clarity on whether financial advice is required.

The FCA will shortly be setting out the next steps in relation to its new duty to limit early exit charges, with a view to implementing the duty before the end of *March 2017*. TPR will work alongside the FCA to develop the design and level of the limit for FCA-regulated schemes to ensure any relevant concerns regarding trust-based schemes are appropriately addressed for all consumers.

View the consultation response.

DWP publishes consultation response and draft regulations on member-borne commission ban

Of interest to occupational schemes proving DC benefits and which are used as qualifying schemes for auto-enrolment purposes, is the DWP's recently published consultation response on banning member-borne commission. The response includes a consultation on the draft Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2016 implementing the ban.

The DWP plans to implement the ban broadly in line with its proposals set out in the October 2015 consultation paper. The ban will apply to occupational pension schemes that provide money purchase benefits and which are used as qualifying schemes for automatic enrolment in relation to at least one jobholder.

On a key aspect of the proposals, the DWP has decided that the duty to comply with the ban will be imposed on service providers, although trustees will be required to inform service providers whether their scheme is a qualifying scheme used for auto-enrolment. TPR will be responsible for enforcing the ban under its existing powers. Trustees will be required to report in the scheme return whether or not the service provider has confirmed to them that they have complied with their regulatory duty.

As originally proposed, the ban will be implemented in two stages. The regulations (after consultation) will come into force on *April 6, 2016* but the ban will not apply to charges under commission arrangements entered into before that date, unless the agreement is varied or renewed on or after April 6, 2016. The DWP will consult later in the year on regulations to implement the ban in relation to existing commission arrangements.

Consultation on the draft regulations implementing the ban ended on *February 9, 2016*.

NEST consults on rule changes ahead of removal of contribution and transfer restrictions from April 2017

Of interest to all schemes using the National Employment Savings Trust (NEST) for auto-enrolment purposes is the current consultation on proposed changes. The changes are due to come into effect from *April 1, 2017* and the consultation period runs until *March 21, 2016*.

The proposed changes include:

Member contributions

The current restrictions on the total amount of annual contributions that can be made to NEST by a member will be removed. NEST's current annual contribution limit is £4,700 a year.

Transfers in
NEST will be allowed to accept with-consent bulk transfers into and out of the scheme, for existing members. The trustee will also have the power to accept an individual request to transfer into the scheme that is 'consistent with its status as a registered pension scheme'. Any such transfer will be subject to any requirements or restrictions the NEST trustee wishes to apply. Individuals who have a statutory right to transfer out of the scheme will also be able to request this from the trustee.

Pension flexibility
NEST will amend its rules to allow members to take advantage of the DC pension flexibilities. Currently NEST only permits members to access a full uncrystallised funds pension lump sum (UFPLS), but from *September 2016*, a partial UFPLS will also be available, subject to restrictions to allow for 'cost and administrative workability'.

The consultation closed on *March 21, 2016*.

View the consultation paper.

Auto-enrolment: consultation on further exceptions to employer duties and new process for re-declaration of compliance

Of general interest is the DWP's publication of *Technical changes to Automatic Enrolment: consultation on draft regulations* and the draft Occupational and Personal Pension Schemes (Automatic Enrolment) (Miscellaneous Amendment) Regulations 2016. The proposed regulations will introduce a simpler process for the re-declaration of compliance and make it easier for employers to bring their staging dates forward. They will also create further exceptions to the employer duties in relation to company directors and limited liability partnerships. The consultation closes on *February 16, 2016*.

Consultation on technical amendments to the auto-enrolment process
The DWP is consulting on technical changes to secondary legislation to further simplify the automatic enrolment framework. The proposals are included in the draft Occupational and Personal Pension Schemes (Automatic Enrolment) (Miscellaneous Amendments) Regulations 2016, published alongside the consultation paper will amend the following sets of regulations:

- The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (Automatic Enrolment Regulations)
- Employers' Duties (Implementation) Regulations 2010 (Implementation Regulations)
- Employers' Duties (Registration and Compliance) Regulations 2010 (Registration and Compliance Regulations).

Proposed changes
Two new exceptions to the employer duty to auto-enrol (and re-enrol) workers will be created:

- Company directors – an exception for workers who hold office as a director of the company that employs them is being introduced in response to representations from small businesses. The proposed extension of the exemptions is drafted widely to include directors of companies who employ workers as well as director-only companies.

- Limited Liability Partnerships (LLPs) – an exemption for individuals who are members of an LLP and not treated for income tax purposes as being employed by the partnership, referred to by the DWP as 'genuine partners' is being introduced.

  This follows the case of *Clyde & Co LLP v Bates van Winklehof* [2014] in which the Supreme Court held that a member of an LLP counted as a 'worker' for the purposes of section 230(3) of the Employment Rights Act 1996, which protects whistleblowers. The definition of 'worker' under auto-enrolment legislation (section 88, Pensions Act 2008) is in substantially the same form as section 230 and so currently, LLP members could be subject to the auto-enrolment duties.

Clarification of exception for workers who received winding up lump sum

A further amendment to the Automatic Enrolment Regulations clarifies that the existing exception for workers who have received a winding up lump sum only applies where all the events specified occur within the same 12 month period.

The consultation paper notes that if the worker who received the winding up lump sum becomes eligible for enrolment after the 12 month period has elapsed, they should be auto-enrolled in the usual way.

Extension of exceptions to cover new transitional protection from April 2016

Separate legislation will be introduced to extend the current exemption from the employer duty where a jobholder has claimed lifetime allowance transitional protection to cover the new transitional protection available for individuals affected by the reduction in lifetime allowance from £1.25 million to £1 million from *April 6, 2016*. The amendment will be made through an additional provision in the Finance Act 2016, which will be backdated to *April 6, 2016*.

Deadline for re-declaration of compliance

Employers are obliged to re-register with TPR by providing a fresh declaration of compliance every three years. The current regulations contain two different deadlines for providing this re-declaration and the draft regulations replace these two deadlines with one five month re-declaration deadline for all employers. The new deadline will be five months after the third anniversary of the staging date, with subsequent deadlines being five months after the third anniversary of their last re-enrolment date.

Bringing the staging date forward

The regulations amend the conditions employers must satisfy if they want to bring their staging dates forward as follows:

- the current requirement to obtain the agreement of the scheme's trustees or managers will be removed for employers who have no-one to enrol (the DWP's evidence suggests that a proportion of the employers left to stage between now and 2018 will have no workers eligible to enrol)

- employers who have no-one to enrol will be allowed to bring forward their staging date to any date, rather than the first of the month as currently required

- the requirement for an employer who wants to bring their staging date forward to give TPR one month's notice will be removed. Instead, the employer must notify TPR no later than the day before their chosen new staging date. Such employers may also submit their declaration of compliance to TPR at the same time.

Abolition of DB contracting-out: alternative quality requirements for DB schemes

In consequence of the abolition of DB contracting out in April 2016, the regulations amend the provisions of the Automatic Enrolment Regulations providing employers with an alternative quality requirement for DB schemes based on the cost of accruals. A transitional easement will allow employers of schemes that satisfy the contracting out conditions on *April 5, 2016* and have not changed the benefits in their schemes to apply the cost of accruals test at scheme level. Under the easement, the test can apply at scheme level even if there is a material difference in the cost of the benefits accruing to different groups of members. The easement applies until the earlier of the effective date of the first actuarial report on or after *April 6, 2016* or *April 5, 2019*.

The consultation closes on *February 16, 2016*. The DWP aims to publish a response to this consultation in early March 2016 with a view to making the regulations in the *April 2016*.

HMRC consults on new information requirements for tapered annual allowance

Of general interest is HMRC's publication of draft regulations introducing new information requirements for scheme administrators in relation to the tapered annual allowance for high-earning individuals from *April 6, 2016*. The consultation period ended on *February 17, 2016*.

Under the proposed Registered Pension Scheme (Provision of Information) (Amendment) Regulations 2016, scheme administrators will be required to provide a pension savings statement if the scheme is a public service pension scheme or an occupational pension scheme and the member's pensionable earnings for that tax year exceed £110,000. This will ensure that the member has the information they need to determine whether or not they may be subject to a tapered annual allowance (TAA) for 2016/17 onwards. The regulations also clarify what information scheme administrators are required to provide to a scheme member in relation to the 2015/16 tax year.

The introduction of the taper for high earners from the start of the 2016/17 tax year was announced at the July 2015 Budget. The taper will apply for individuals with 'adjusted income' of £150,000 a year or more (including the value of pension contributions), subject to a 'threshold income' floor of £110,000 (excluding the value of pension contributions). For those affected, the TAA will be gradually reduced so that individuals with an adjusted income of £210,000 or more will be entitled to an annual allowance of £10,000.

The deadline for comments on the draft regulations was *February 17, 2016*.

View the draft regulations.

DWP finalises changes to occupational DC scheme administration requirements

Of interest to all DC schemes is the DWP's publication of its response to the consultation on reducing the regulatory burdens on DC schemes. The draft Occupational Pension Schemes (Scheme Administration) Regulations 2016 have now been laid before Parliament, and are expected to come into force on *April 6, 2016*.

In our November 2015 update, we reported on the DWP's consultation on minor changes to various aspects of the scheme administration regime aimed at reducing the 'regulatory burden' on occupational pension schemes.

On February 1, 2016, the DWP published its response to the part of its November 2015 consultation exercise relating to its proposed changes to the DC governance requirements, and the draft Occupational Pension Schemes (Scheme Administration) (Amendment) Regulations 2016 were laid before Parliament. A response to the other topics covered in the consultation exercise will be published in due course.

The finalised version of the draft Scheme Administration Amendment Regulations contains the provisions outlined below.

- Narrowing the definition of a 'relevant multi-employer scheme', largely on the basis proposed in November 2015.

- The DWP's interpretation of the amended definition is that it will cover schemes which actively undertake commercial advertising to unconnected employers and also those industry-wide schemes which are open to employers within the same industry, even if they do not advertise as such. The definition will also catch schemes that have promoted themselves in the past as open to unconnected employers but are no longer doing so. According to the DWP, the definition should not catch schemes that have never promoted themselves as such, even if their scheme rules suggest that they might expand.

- According to the DWP, a multi-employer scheme that is open to connected employers would not be caught by the additional requirements. This means corporate group schemes may be open to employees of non-associated employers that are connected to an employer within the group in various ways outlined further in the consultation response.

- Allowing a deputy chair (or other person appointed by the trustees) to sign the chair's annual statement if there is no chair in place for any reason and a replacement has yet to be appointed.

- Introducing a statutory override where there are provisions in a scheme's trust deed or rules that conflict with the key requirements for the majority of trustees to be non-affiliated and for there to be at least three trustees.

- Removing the requirement for the chair of NEST to be appointed within a period of three months.

- Giving schemes established by statute up to six months from *April 2016* to comply with the requirements that there should be a majority of non-affiliated trustees and that there should be at least three trustees.

The draft regulations will need to be approved by both Houses of Parliament before they are made, but are intended to come into effect on *April 6, 2016*.

Comment

The amendments made to the definition of ‘relevant multi-employer scheme’ are likely to go some way towards addressing the concerns that multi-employer group schemes may be caught, particularly following corporate reorganisations. However, even in its revised form the definition remains unwieldy. The absence of further clarification about the circumstances in which a scheme is being or has been ‘promoted’ as a scheme where participating employers need not be connected employers will mean some uncertainty remains, and hopefully the DWP may publish some explanatory guidance.

View the consultation response.

View the draft regulations.

Auto-enrolment: draft order setting 2016/17 earnings trigger and qualifying earnings band laid before Parliament

A draft statutory instrument has been laid before Parliament revising the auto-enrolment qualifying earnings band for the 2016/17 tax year, which are set out below.

The Government announced in December 2015 the outcome of its annual review of the qualifying earnings band and earnings trigger. For the 2016/17 tax year, the following limits will apply:

- the upper end of the band will rise to £43,000 from £42,385, in line with the revised upper earnings limit for National Insurance purposes
- the lower end of the band will remain fixed at £5,824, again in line with the lower earnings limit for 2016/17
- the earnings trigger will remain fixed at £10,000.

In addition to these annual figures, the draft order also confirms the correct rounded amounts which employers should use for pay reference periods of lengths ranging from one week to six months. The draft order, once approved, is due to come into force on A*pril 6, 2016*.

View the draft order.

Abolition of DB contracting-out: proposed power to modify scheme rules

Of interest to all contracted-out DB schemes is the proposal to introduce a new scheme modification power in relation to the revaluation of Guaranteed Minimum Pensions (GMPs) for early leavers.

The introduction of the new flat-rate State Pension from April 6, 2016 will mean contracting-out of the additional State Pension will end, as the additional State Pension will no longer exist.

The DWP intends to introduce new legislation that will enable formerly contracted-out DB schemes to modify their rules in relation to the revaluation of GMPs for early leavers.

Currently, legislation provides that a scheme may provide fixed rate revaluation of GMPs for early leavers. This is triggered by reference to the revaluation rate that is applicable in the year in which reference to the revaluation rate that is applicable in the year in which contracted-out service ends.

Schemes will be able to modify their rules, in relation to members who ceased contracted-out employment on *April 6, 2016* (as a result of abolition), to choose:

- to operate fixed rate evaluation calculated from the date when pensionable service ends (rather than from the date contracting-out ends) or

- to revalue GMPs by reference to earnings in the final tax year of earner's working life – that is, by reference to statutory increase orders in force at the time.

The changes are proposed in response to concern that, when contracting-out ends in April 2016, fixed rate revaluation would be triggered automatically simply because members would have left contracted-out service, as it will no longer exist.

The new modification power would have retrospective effect to allow changes to apply from *April 6, 2016*.

High Court grants summary judgment on limitation issue

In *Capita ATL Pension Trustees Ltd and others v Sedgwick Financial Services Ltd and others* [2016], the High Court considered an application for summary judgment in relation to a claim for damages by the trustees of the Sea Containers 1983 Pension Scheme (the Trustees). Summary judgment was granted to the Trustees on a limitation issue, with the Court providing guidance on determining the date on which the trustees first had requisite knowledge for bringing a limitation action.

Background

A court may decide to settle a whole case or a particular issue by summary judgment. This means that the issue is decided at an early stage and the costs of a full trial are avoided. A finding is made for a party without a full trial of the issues and hearing of evidence on the basis that the claim, defence or issue has no real prospect of success and there is no other compelling reason why the matter should be disposed of at trial.

The dispute in this case concerned a failure to properly advise on procedural requirements in relation to equalisation amendments and other benefit changes made in August 1994.

The defendants (various companies in the Mercer group) applied for summary judgment as to parts of the claim against the first defendant. They argued that the second defendant had replaced the first defendant in providing services to the trustees on January 1, 1994 by novation (referred to as 'the novation issue'). The defendants also sought summary judgment as to the entirety of the claim against the second defendant on limitation grounds.

The judge did not grant summary judgment on the novation issue, but did grant summary judgment in favour of the defendants on the limitation issue, providing guidance on determining the date on which the trustees first had requisite knowledge for bringing an action for the purposes of section 14A of the Limitation Act 1980.

Relevant law

Section 14A of the Limitation Act 1980 (LA 1980) extends the 3-year limitation period for claims in negligence to the date when a party knew or reasonably ought to have known that it had a claim. Section 14A(10) states:

'For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire:

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.' (Emphasis added.)

Decision

The judge (Proudman J) did not grant summary judgment on the novation issue, stating that she was not prepared to decide a question of fact (whether or not a letter from the first defendant stating that services would be provided by the second defendant from January 1, 1994 was sent and received) without full oral evidence tested in cross-examination.

However, the judge did grant summary judgment in favour of the defendants on the limitation issue. The crucial point in this case was the date on which the Trustees first had the knowledge required for bringing an action for damages against the second defendant. The question the Court ultimately had to consider was whether the fact that the second defendant could be liable was only ascertainable with the help of expert advice, and whether the trustees took all reasonable steps to obtain that advice within section 14A(10) of the LA 1980.

The judge agreed with the defendants that the last part of section 14A(10) of the LA 1980 only applies where the relevant fact (in this case the potential liability of the second defendant) is ascertainable only with the help of expert advice. In this case, the claimants had actual knowledge of these matters, having been informed that the employer companies considered that there had been defective equalisation amendments, by a letter of July 6, 2007. The judge noted that the scheme's principal employer had thereafter realised that there might be a cause of action against the second defendant since it had entered into a standstill agreement with that defendant in June 2008. In addition, the judge held that the claimants also had constructive knowledge of the relevant facts. She noted the defendants' argument that, even if the last part of section 14A(10) did apply, it was reasonable to take a second opinion from a specialist pensions solicitor in this case so that the trustees were fixed with constructive knowledge of the advice they would have obtained had they done so. Proceedings against the second defendant were dismissed. All claims against the first defendant remain.

View the judgment.

Hughes v Royal London Mutual Insurance Society Limited [2016]: High Court rules on savers' entitlement to transfer pension rights

In a decision which could herald a new wave of pension liberation cases, the High Court has overruled on appeal a decision of the Pensions Ombudsman in June 2015. In *Hughes v Royal London Mutual Insurance Society Limited*, the Court held that an insurer – the provider of a personal pension scheme (PPS) of which Ms Hughes was a member – had no right to block her pension transfer request where it suspected the receiving scheme was a pension liberation vehicle.

Background

The case involved an appeal by Ms Hughes against a determination of the Pensions Ombudsman (PO) in June 2015 in which her complaint against the *Royal London Mutual Insurance Society Limited* (Royal London) was dismissed.

Ms Hughes was a member of a PPS administered by Royal London, and had acquired an entitlement to the cash equivalent of the accrued rights under that PPS. She wrote to Royal London requesting a transfer of the cash equivalent rights to an occupational pension scheme (OPS) of which she was also a member. Under the rules of the OPS, she would then acquire 'transfer credits' in that scheme. Royal London refused Ms Hughes' request and expressed concerns about the possibility that the OPS was a pension liberation vehicle. Royal London also questioned whether Ms Hughes was an 'earner' within the definition of 'transfer credits' in the OPS, which would mean she could not acquire the transfer credits under the OPS and could therefore not transfer her cash equivalent rights from the PPS.

Ms Hughes complained to the PO on two grounds:

- that Royal London was wrong to deny the transfer of her cash equivalent rights
- in the alternative, that under the rules of the PPS, Royal London had a discretionary power to transfer her rights under the PPS to the OPS and had improperly exercised that discretion by refusing to make the transfer.

The PO determined that in order to be an 'earner' within the OPS definition of 'transfer credits', Ms Hughes had to be an earner in relation to a scheme employer participating in the OPS, and that she was not such an earner. He also held that Royal London did not act improperly in deciding not to exercise its discretionary power to transfer Ms Hughes' accrued rights to her OPS. He dismissed her complaint.

Ms Hughes' appeal to the High Court challenged both elements of the PO's determination. She argued that:

- He had wrongly construed the definition of 'transfer credits' and she was 'an earner' within that definition, even though she had no earnings from a scheme employer in relation to the OPS. She argued that there was no requirement in the relevant legislation for her to be an earner in receipt of remuneration from employment with an employer under the OPS.
- Alternatively, the PO should have found that Royal London exercised its discretion improperly when considering her transfer request.

The Court's decision

The Court considered whether the PO's or MS Hughes' interpretation of the terms 'transfer credits' and 'earner' was correct. It noted that the PO's interpretation involved reading words into the statutory definition of 'transfer credits', which, following the ruling in Pi Consulting he felt able to do. However, while the PO's interpretation led him to conclude that Ms Hughes needed to be an earner in receipt of earnings from an OPS employer in order to transfer into that scheme, the Court disagreed.

Morgan J acknowledged that, although in some previous cases the Court had found it possible to supply missing words in a statutory definition, he was not satisfied that it was an option for him in this case. This meant he favoured Ms Hughes' interpretation of the definition of 'transfer credits' and that in order to be 'an earner', it was not necessary for her to be in receipt of earnings from an employer in the OPS. The fact that she had earnings from another source or sources meant that she was entitled to require Royal London to transfer her cash equivalent to the OPS.

This decision made it unnecessary to consider the second limb of Ms Hughes' appeal in relation to Royal London's exercise of its discretionary power.

Comment

The PO has taken the relatively rare step of commenting on this appeal, saying:

'[The PO] has around 200 live cases which are affected by the ruling, so we welcome the clarity that it brings to those using our Service and to the industry generally.

In particular, it provides instruction to trustees and administrators that, assuming the other requirements for a statutory transfer right are made out, members do not need to be in receipt of earnings from an employer sponsoring the occupational pension scheme to which they wish to transfer their pension. Earnings from another source are sufficient.

It seems likely that most transferring members will meet this requirement so, beyond verification of earnings and the provision of risk warnings, trustees and administrators will be conscious that under current legislation they cannot refuse such a transfer – even if they have significant concerns that it may be for the purposes of pension liberation.

Members with similar complaints will benefit from the ruling but should note that providers may need to seek further information and wish to ensure the risks are fully understood, before a transfer is made.'

It will now be much easier for individuals to move their money from legitimate schemes to potentially suspicious liberation vehicles. In this case, it appears that Royal London's only concern was to comply with regulatory guidance and to assist its policyholder in avoiding circumstances where all or part of her pension benefits could be lost.

Until now, scheme administrators have usually requested proof of an earnings relationship between the individual who wishes to make a transfer and the provider of the potential new scheme. Where questionable schemes have been unable to satisfy this requirement, trustees have legitimately refused transfers where they had reservations about receiving schemes being potential liberation vehicles. While the Hughes decision simplifies the position for pensions providers making decisions on individual transfer requests, it does create uncertainty in the battle against pension scams.

Is the purpose of the law to stop people making reckless investment decisions? It could be argued that there is no need to spend time and money in an attempt to prevent individuals investing in scams and ultimately being at risk of losing their savings – let people choose to do as they wish with their own money. However, in the event that such savings are lost, there will be an inevitable cost to the public purse in the longer term when such unfortunate investors turn to State benefits in their impoverished retirement.

Reid v HMRC [2016]: Compensation for rights lost on TUPE transfer (including pension) held to be partly non-taxable

The First-tier Tribunal (the Tribunal) has held that a lump sum payment made to compensate an employee for the loss of pension, share and other contingent rights on the transfer of a business to a new undertaking was taxable only in part. The tribunal found that the payment was not made to induce the taxpayer to become an employee of the transferee and that the reasons for making the payment were dissociable. The compensation lump sum should therefore be apportioned between each lost right.

Background

Under the Income Tax (Earnings and Pensions) Act 2003 (ITEPA), employees are liable to income tax on earnings 'from' an employment. Section 401 of ITEPA imposes a charge to tax on payments made directly or indirectly in relation to a person's employment or a change in that person's duties or earnings, including, for example, payments made on redundancy. There is an exemption for the first £30,000.

The charge to tax on earnings (section 62, ITEPA) takes priority over the section 401 charge. HMRC's long-held view is that payments to employees to compensate for changes in terms of employment are taxable as earnings as deriving from the employment. In practice, HMRC argues that a payment to compensate for a variation in duties or earnings is made in return for the employee remaining as an employee, and, as such, the payment is taxable as earnings. The fact that it may also fall within section 401 of ITEPA 2003 does not help, since section 62 takes precedence.

The Tribunal (in *Hill v HMRC* [2015]) has previously held that a payment to compensate the employee for a change in his employment terms was taxable as earnings. The Court of Appeal (in *Hamblett v Godfrey (Inspector of Taxes)* [1987]) held that a compensation payment for the loss of a employment right to join a trade union, was taxable as earnings.

In *Kuehne + Nagel Drinks Logistics Ltd, Stott and Joyce v HMRC* [2009], the Tribunal held that if a payment is made for more than one reason, and those reasons are not dissociable, the payment will be taxable if one of the substantial reasons for the payment is for being or acting as an employee.

If the payment is not made as an inducement to become or to remain an employee, but is made to buy-out a contingent right to a payment, the payment should be taxed in the same way as the bought out payment would have been taxed. This 'substitution principle' arises from the decision of the House of Lords in *Mairs v Haughey* [1993].

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), on certain transfers of (part of) an undertaking, any of the transferor's employees assigned to that (part of the) undertaking are transferred to the transferee. The regulations provide that the transfer 'shall not operate so as to terminate the contract of employment of any person employed by the transferor … but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee'.

Facts of the case

The taxpayer was employed by BP. By way of a TUPE transfer, BP transferred part of its business to S & J D Robertson North Air Ltd (North Air). As North Air's reward and benefit scheme was less generous than BP's a lump sum compensation payment, described as a 'buy-out payment', of almost £26,000 was negotiated. This was to compensate for loss of pension, bonus and share rights and loss of lunch allowances.

A framework agreement set out how compensation for each right was calculated, but a single lump sum payment was made. A loyalty payment was also separately negotiated, payable broadly on the first anniversary of employment with North Air, but was not, in fact, paid. Payment of the buy-out payment was conditional on the taxpayer complying with the terms of a compromise agreement: signing and returning the compromise agreement and entering into a new contract of employment with North Air. The compromise agreement confirmed that the buy-out payment was compensation for the termination of the taxpayer's employment with BP and for the taxpayer relinquishing access to the BP reward and benefit scheme. The compromise agreement also confirmed that the buy-out payment would be subject to deduction of tax and NICs 'as may be required by law'.

The taxpayer treated the buy-out payment as falling within section 401 of ITEPA (and, being less than £30,000, exempt from tax) as a payment for loss of pension rights following the termination of his employment with BP. HMRC determined that the whole buy-out payment was taxable as earnings as being from the taxpayer's employment. HMRC amended the taxpayer's self-assessment return and the taxpayer appealed to the Tribunal.

Decision

The Tribunal allowed the appeal in part.

The Tribunal noted that the reason for the buy-out payment was to compensate for loss of pension, share and bonus rights and the loss of lunch allowances. That was clear from the evidence, most notably the compromise agreement. There was no evidence of any other reason for the payment. In particular, there was no evidence that the payment was made as an inducement to enter into employment with North Air or to accept different terms of employment. The Tribunal rejected HMRC's submission that the conditions set out in the compromise agreement were sufficient to make the payment an emolument of employment. The requirement to enter into an employment contract with North Air was not a reason for the payment but the trigger for the payment.

The Tribunal accepted that there were similarities between the facts of this case and those of *Hamblett*, but concluded that the payment in *Hamblett* was taxed as earnings because of an analysis of the lost rights, which in that case were employment rights directly connected with the fact of the employee's employment. In contrast, the lost rights in the present case were pension, share, bonus and lunch allowance rights. The tribunal analysed *Hill* in the same way.

As the sole reason for the payment was to compensate for the lost rights, rights that were contingent on the taxpayer remaining in employment with BP, the *Mairs* substitution principle applied. Accordingly, the tax treatment of the buy-out payment was determined by the tax treatment of the lost rights. Further, in contrast with *Kuehne*, the buy-out payment in this case comprised different components paid for different reasons and could, therefore, be apportioned between their constituent elements.

The tribunal disagreed with HMRC that there had been no termination of employment for tax purposes. Instead, it agreed with the Tribunal in *Kuehne* that while TUPE deems employment to continue for certain employment law purposes, it does not have the effect of deeming there to be a continuation of employment for tax purposes. In any event, the tribunal considered that the tax treatment of the buy-out payment did not turn on whether the employment was terminated or continued.

Comment

HMRC's long-held view is that payments to employees to compensate for changes in terms of employment are taxable as earnings as deriving from the employment. This decision illustrates that such a broad-brush approach is not right. The reasons for the payment must be carefully analysed and HMRC should not assume that payments are made in return for the employee becoming or remaining an employee if the evidence suggests otherwise.

The tribunal rejected HMRC's submission that the taxpayer's compliance with the terms of settlement agreement and, in particular, entering a new employment contract, was sufficient to make the payment an emolument of employment. Compliance was the trigger for the payment, not the reason for it. This illustrates the importance of recording the reasons for the payment in the settlement agreement.

The decision also highlights the very fine line between a payment being treated as taxable earnings or as buy-out payment taxed according to the nature of the payment it replaces. As the tribunal emphasised, the resolution is fact sensitive and a careful analysis of the reason(s) for the payment is required.

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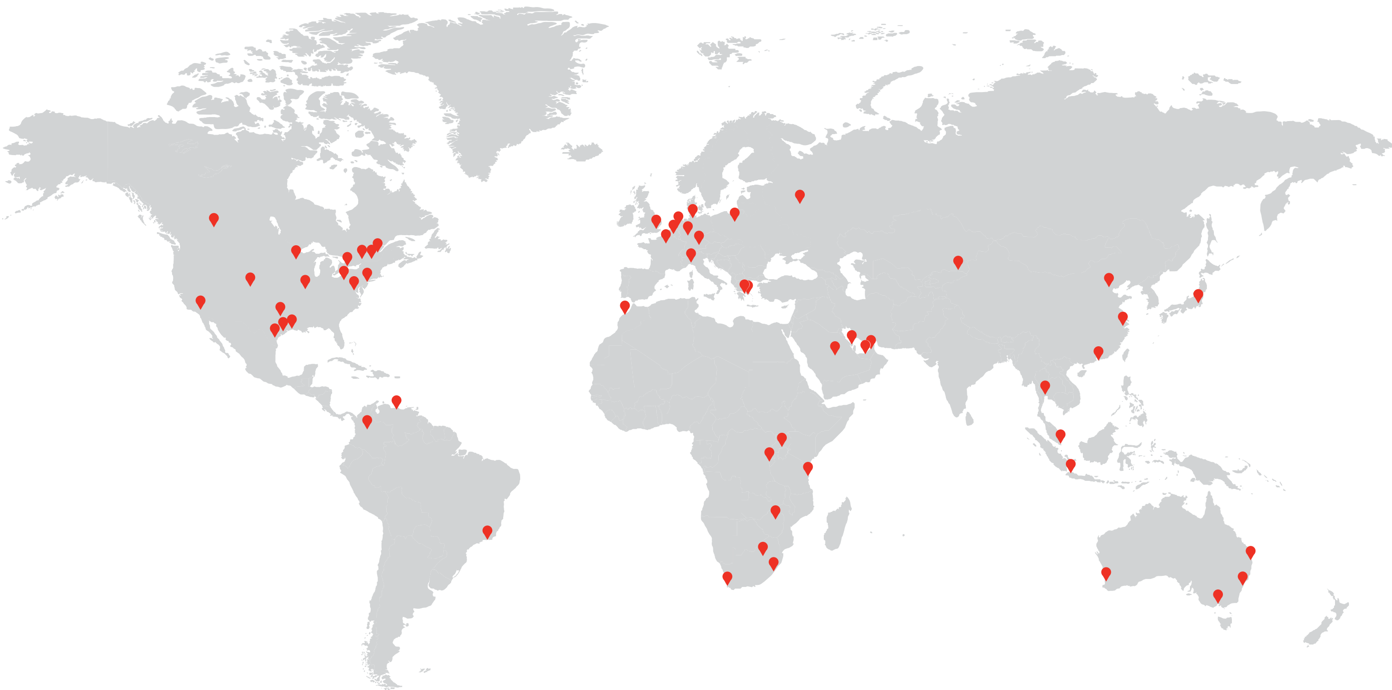

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